

# **GUIDE TO CONFIDENTIALITY LAWS APPLICABLE TO CHIPS PROCEEDINGS**

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# **GUIDE TO CONFIDENTIALITY** **LAWS APPLICABLE TO CHIPS PROCEEDINGS**

## **CHAPTER 1** **INTRODUCTION**

### **CHILDREN'S CONFIDENTIALITY PROJECT**

#### **History**

The State of Wisconsin has a long history of making progressive efforts to protect children from abuse and neglect. The Children's Code, Chapter 48, Wisconsin Statutes, provides the legal foundation for the reporting, investigation and prosecution of child abuse/neglect cases. Implementation of the statutory provisions relating to Children in Need of Protection and Services (CHIPS) proceedings requires collaboration among professionals working in the child welfare system, other aspects of the human/social services system, and the court system.

The Director of the Office of State Courts (Children's Court Improvement Program) and the Wisconsin Department of Justice (Children's Justice Act Program) collaborated in 1999 to initiate the Children's Confidentiality Project (Project) as a response to issues discussed at a 1997 conference convened by the Wisconsin Supreme Court. At that conference, participants began to explore ways in which all the entities involved in child abuse and neglect cases could coordinate their efforts to improve services for children and their families. They recognized that the laws protecting the confidentiality of information and the day-to-day practices of the professionals involved in the child welfare field each played a significant role in shaping their interactions.

#### **Confidentiality Advisory Board (CAB)**

The partnering agencies appointed a Confidentiality Advisory Board (CAB) to identify specific Project goals and oversee their implementation. CAB membership included public and private family service providers, law enforcement agencies, physicians, judges, prosecutors, guardians ad litem, court practitioners, tribal attorneys, educators, legislators, and child welfare and juvenile justice professionals. The CAB formed two working groups with the following goals:

- Statutory Analysis Working Group: Compile a description of Federal and Wisconsin laws that govern the sharing of confidential information by professionals involved in all aspects of child abuse and neglect cases. The resulting document, "Statutory Analysis Working Group Report" identified nearly 30 applicable laws.
- Current Practice Issues Working Group: Describe the day-to-day practices of entities involved in child abuse and neglect cases with respect to requesting, using and disclosing confidential information about children and their families. The group conducted interviews with practitioners from numerous disciplines and developed a written survey to mail to hundreds of professionals. The document summarizing the results, "Practice Issues Working Group: Practitioner Survey" revealed differences in the experiences of professionals requesting and disclosing information. Many survey respondents expressed frustration with the complexity of privacy laws and inconsistencies of the practices of various professionals.



Based upon the reports of the working groups, the CAB recommended the production of two written resources to improve professional and consumer understanding of confidentiality laws:

- Reference guide/manual for professionals: To explain the privacy protections provided by and interactions among Federal and Wisconsin confidentiality laws, and to provide practical guidance for proper implementation of the laws.
- Informational handout for parents. To inform parents/guardians of their legal rights with respect to the use and disclosure of confidential information about their children and themselves.

In preparation for drafting the above-described documents, a legal consultant conducted a thorough comparative analysis of the Wisconsin and Federal confidentiality laws, identified by the Statutory Analysis Working Group, to determine which laws actually control the exchange of confidential information in Wisconsin. The resulting document, "Conflict Analysis of Wisconsin and Federal Laws Governing Confidentiality of Information Relevant to CHIPS Proceedings" offered advice as to which laws have primary relevance in CHIPS proceedings. That analysis formed the basis for this Guide.

## **GOALS AND CONTENT OF GUIDE**

The Guide to Confidentiality Laws Applicable to CHIPS Proceedings provides information about the exchange of confidential information among professionals involved in Children in Need of Protection and Services (CHIPS) cases under Chapter 48, Children's Code, of the Wisconsin Statutes. Professionals include persons working in county departments of human/social services, school districts, State of Wisconsin Department of Health and Family Services and Department of Corrections, non-profit and private agencies that provide services to children and families, health care providers, court intake workers, judges, district attorneys, defense attorneys, and guardians ad litem. Privacy laws that protect confidential information relating to a CHIPS case are complex. Adhering to the legal requirements can be challenging to those who create, use, request, and disclose confidential information. To best serve the children of Wisconsin, the professionals working in the child welfare field must understand how to communicate with one another within the law.

This Guide explains Federal and Wisconsin laws that govern the use and disclosure of medical, mental health, education, law enforcement, court, juvenile justice, social services agency and other confidential information. Tables appear throughout the Guide to facilitate the reader's understanding of the complex interaction of privacy laws. Citations to relevant laws appear throughout the Guide so that readers may review the laws directly.

Additionally, the Guide discusses the elements of written authorizations for different types of information and requirements for recording disclosures of information. The final chapter presents information about the civil and criminal penalties, and possible employee discipline, for violations of privacy laws.

Although this Guide is a product of the Children's Confidentiality Project (described below) with a focus on child abuse and neglect cases, it may be useful to professionals outside of the child welfare field. The Federal and Wisconsin privacy laws discussed apply to all exchanges of confidential information.

Appendices include some of the tables and summary information in a larger font than within the Guide. Those versions of the tables are provided for printing and use as stand-alone documents.

The Guide does **not** provide legal advice for specific cases or a how-to guide for processing reports of child abuse and neglect, or other CHIPS activities. The Wisconsin legislature and U.S. Congress regularly enact, revise and rescind laws. Courts interpret laws in the decisions they issue. Professionals should contact their respective legal counsel as needed and not rely on this Guide for legal advice in a particular case.

## CHAPTER 2

### COMMON CONCERNS AND FREQUENTLY ASKED QUESTIONS

#### COMMON CONCERNS

The CAB reviewed the interview and survey results generated by the Current Practice Issues Working Group. Although many responders supported the privacy protections provided by the laws, a significant percent expressed frustration because of the complexity of the laws. The following common themes emerged:

- Laws are complex and difficult to understand.
- Too many laws govern the privacy of confidential information.
- Different laws cover the various types of information.
- Laws use inconsistent definitions.
- Laws require different elements to be included in a valid written authorization.
- Laws include inconsistent exceptions to the requirement of obtaining written authorization.
- Laws require formal procedures instead of permitting informal sharing of information.
- Laws do not adequately recognize situations in which professionals are acting in the “best interests” of children.

#### FREQUENTLY ASKED QUESTIONS

Survey respondents raised many questions. Providing simple answers to some the questions is not possible due to the complexity of the laws, but the following questions and answers deal with many basic issues.

**Can a professional discuss confidential information with another professional without a written authorization as long as no written information is exchanged?**

**NO:** most confidentiality laws treat verbal communication of information the same as the exchange of written information.

**Is it legal to “informally” exchange confidential information, based upon the formation of mutually trusting relationships among professionals, if it will not be used in a report?**

**NO:** privacy laws govern all exchanges of information.

**Why are the laws so complicated?**

- The U.S. legal system consists of a complex mixture of federal and state laws, as well as a system of multi-tiered federal and state courts that interpret the laws.
- Laws often result from compromises among numerous competing interests making them seem confusing.
- State legislatures and the U.S. Congress (Senate and House of Representatives) enact, revise, and rescind laws over a long period based upon varying political agendas.
- Law-making bodies generally do not assess the overall organization and internal logic of laws that have been enacted and revised over many years.
- One law may reference multiple laws requiring reading of the other laws to understand the first law consulted.

**Why is it so difficult to provide simple and consistent guidelines regarding the exchange of confidential information?**

- Federal laws/regulations, Wisconsin laws/administrative rules, and court decisions interact in complex ways.
- More than one law may cover a particular type of information requiring an analysis of which law governs.

**Why do the laws include different definitions of records?**

- Law-making bodies with differing political agendas enact federal and Wisconsin laws over a period of many years.
- Technology and the nature of record keeping have changed over time; e.g., development of email, FAX and the internet; with only some laws being enacted or existing laws being revised to reflect changes.
- Some laws deal with a general set of records while others only address a select type of record.

**Why do laws differ with respect to the exceptions to the requirement of obtaining a written authorization?**

- Law-making bodies with differing political agendas enact laws.
- Special interest groups lobby law-making bodies to either tighten or loosen privacy protections accorded to specific types of information.

**Why do the requirements for written authorizations vary?**

- Public policy has moved towards increased protection of privacy. Some laws have been revised while others have not.
- Law-making bodies do not all agree on the exact elements of a valid authorization.

**Do federal laws always overrule state laws about confidentiality?**

- Generally, the law providing the most stringent privacy protection to the subject and the law providing the greatest access to the information by the subject govern, unless a federal law specifically states that it pre-empts state laws.

**Why do the child abuse/neglect laws fail to include broad authorization for exchange of information perceived by child welfare professionals to be in the “best interests” of a child?**

- Privacy rights are basic to the legal foundation of our society and only significant public interests outweigh the protections they provide.
- “Best interests” is a subjective concept defined differently depending on one’s role in a CHIPS proceeding.
- CHIPS proceedings can be adversarial and parents/other individuals may have a great stake in the outcome.
- Depending on the outcome of an investigation, a prosecutor may file criminal charges.
- The court may not permit the use of illegally obtained information.

**Why do defense attorneys often refuse to provide any information?**

A defense attorney has the ethical obligation to represent his or her client in a vigorous manner. A defense attorney’s role is not to act in the “best interests” of the child, but to represent the parent. The proceedings are adversarial. A guardian ad litem acts in the “best interests” role.

**Why do some holders of information take so long to respond to a request?**

- Tendency to use caution before disclosing information to avoid violating a law.
- Lack of staff resources to respond promptly.
- Time needed to redact certain information within a document when only a portion of the document may legally be disclosed.

**GENERAL ADVICE FOR DEALING WITH CONFIDENTIALITY LAWS**

- ASSUME THAT CONFIDENTIAL INFORMATION CANNOT BE SHARED IN ANY MANNER WITHOUT A WRITTEN AUTHORIZATION FROM THE SUBJECT OF THE INFORMATION, OR PERSON AUTHORIZED TO ACT ON BEHALF OF THE SUBJECT.
- OBTAIN A VALID WRITTEN AUTHORIZATION WHENEVER POSSIBLE TO AVOID HAVING TO FIND A LEGAL EXCEPTION OR OBTAIN A COURT ORDER.
- REVIEW ANY WRITTEN AUTHORIZATION RECEIVED TO ENSURE ITS VALIDITY BEFORE DISCLOSING INFORMATION.
- BE PREPARED TO CITE THE LEGAL AUTHORITY THAT PERMITS THE REQUEST, USE, OR DISCLOSURE OF CONFIDENTIAL INFORMATION WHEN AN AUTHORIZATION HAS NOT BEEN OBTAINED.
- SEEK A COURT ORDER WHEN THE LAW REQUIRES AN AUTHORIZATION, BUT IT CANNOT BE OBTAINED AND NO LEGAL EXCEPTION APPLIES.
- FINES AND OTHER PENALTIES, INCLUDING PRISON TIME, FOR VIOLATING A PRIVACY LAW CAN BE SEVERE.
- CONSULT WITH LEGAL COUNSEL WHENEVER IN DOUBT.

## CHAPTER 3

### GENERAL LEGAL INFORMATION

#### CHAPTER SUMMARY

Some readers of this Guide may have experience reading and interpreting laws, while others may be quite wary of venturing into that arena. This chapter provides readers with some basic legal information that may prove useful in understanding the other chapters. It contains five sections.

##### Section 1

Provides basic information regarding:

- Wisconsin laws, statutes, and administrative rules
- Federal laws and regulations
- Court decisions
- Conflicts among laws

##### Section 2

Briefly describes the primary laws discussed in the remainder of the Guide and refers to other laws that may be relevant to child welfare cases, but are not presented in any detail in the Guide.

##### Section 3

Discusses legal definitions of records-related terms and explains terminology used throughout the Guide.

##### Section 4

Presents the three paths to be followed to legally use and disclose confidential information: a written authorization, a legal exception, or a court order.

##### Section 5

Provides questions and possible answers that will assist an individual to know what chapter to read for information about certain categories of confidential information, and how to identify the subject, the requester, and the custodian of the information.

#### **SECTION 1: OVERVIEW OF LEGAL INFORMATION**

##### **WISCONSIN LAWS, STATUTES AND ADMINISTRATIVE RULES**

Wisconsin legislators submit bills to the State Assembly and State Senate. When both houses pass a bill, the Governor signs or vetoes the bill. If signed, it becomes a law. Laws are then written in statutory format and placed in the Wisconsin Statutes.

Each chapter of statutes has a title and a number such as the Children's Code, Chapter 48, and the Juvenile Justice Code, Chapter 938. Each statutory provision in a chapter begins with the chapter number and then one or more additional numbers and letters referred to as sections,

subsections, paragraphs and subdivisions. An example of a citation is *s.48.981 (2)(a), Wis. Stats.*

Administrative rules contained in the Wisconsin Administrative Code (Adm. Code) offer guidance for implementing specific statutes. Chapters of administrative rules include a number and the name of the department to which they apply. For example, chapters promulgated by the Department of Health and Family Services include HFS in the title such as Chapter HFS 92, Confidentiality of Treatment Records. Rules within a chapter are identified with a series of numbers and letters. An example of a citation is *s. HFS 92.04, Wis. Adm. Code.*

Please note that most citations to state statutes and administrative rules within the Guide will not be followed by "Wis. Stats." or "Wis. Adm. Code." Citations that include three letters such as "HFS" or "DOC" are from the Administrative Code. Citations that do not include three letters are from the Wisconsin Statutes.

## **FEDERAL LAWS AND FEDERAL REGULATIONS**

The federal regulations contained in the numerous volumes of the Code of Federal Regulations (C.F.R.) provide guidance for the implementation of federal laws passed by Congress. For example, the Health Insurance Portability and Accountability Act (HIPAA) is Public Law 104-191. The federal regulations in volume 45 Parts 160, 162 and 164 implement the HIPAA law. An example of a citation is *45 C.F.R s. 164.512.*

## **CASE LAW: COURT DECISIONS**

Wisconsin and Federal courts issue written decisions that interpret confidentiality laws. The court systems are multi-layered with cases moving from one level to the next when a party files an appeal of a lower court decision. Wisconsin has Circuit Courts in each county, an eastern and western Court of Appeals, and the State Supreme Court. The Federal court system includes federal district courts located across the country, 11 Circuit Courts of Appeal plus the D.C Circuit Court of Appeal, and the U.S. Supreme Court. It is beyond the scope of this guide to include discussions of court decisions relating to confidential information. Practitioners should seek advice of legal counsel.

## **CONFLICTS AMONG LAWS**

Within this guide, the term "law" refers to Wisconsin statutes and administrative rules as well as federal laws and regulations. When privacy laws conflict, the law that generally controls is the law that does one or more of the following:

- Provides the most stringent protection of confidentiality to the subject of the information.
- Provides the greatest access to information to the subject of the information.
- Contains more specificity regarding the type of record/information

## **SECTION 2: LAWS RELATING TO CHIPS CASES**

### **PRIMARY LAWS DISCUSSED IN GUIDE**

The list below includes the primary laws discussed and/or cited in this Guide and the types of information governed by each law.

<b>WISCONSIN STATUTES</b>	<b>INFORMATION COVERED</b>
ss. 146.81-84	Health care provider records.
s. 51.30	Mental health, developmental disability and AODA information.
s. 252.15	HIV test results.
s. 48.78	Client records maintained by an agency under Chapter 48, Children's Code.
s. 48.396	Law enforcement and court records relating to matters under Chapter 48, Children's Code.
s. 48.981	Information relating to child abuse/neglect maintained by an agency under Chapter 48, Children's Code.
s. 938.78	Records maintained by an agency under Chapter 938, Juvenile Justice Code.
s. 938.396	Law enforcement and court records relating to matters under Chapter 938, Juvenile Justice Code.
s. 118.125	Education/pupil records.
Ch. 46	Records maintained by agencies under Social Services, Chapter 46.
Ch. 49	Records maintained by agencies under Public Assistance, Chapter 49.
<b>WISCONSIN ADMINISTRATIVE CODE</b>	<b>INFORMATION COVERED</b>
s. HFS 92.04	Mental health, developmental disability and AODA information as defined in s. 51.30.
s. HFS 145.04	Reports of communicable diseases
<b>CODE OF FEDERAL REGULATIONS</b>	<b>INFORMATION COVERED</b>
42 C.F.R. Part 2	Confidentiality of Alcohol and Other Drug Abuse Patient Information.
45 C.F.R. Part 164	Health Insurance Portability and Accountability Act (HIPAA): Protected health information.
34 C.F.R. Part 99	Family Education Rights and Privacy Act (FERPA): Education records.

### **ADDITIONAL LAWS**

The following list includes statutes and administrative rules that relate to information that could be relevant to a child welfare case. However, the Guide does not include detailed discussions of the listed statutes and rules because they are not likely to play a primary role in a significant percent of cases.

<b>WISCONSIN ADMINISTRATIVE CODE</b>	<b>INFORMATION COVERED</b>
s. HFS 12.10	Caregiver Background Checks: entities that retain background information disclosure forms shall comply with federal and Wisconsin confidentiality laws.
s. HFS 37.06(1)	Information to be Provided to Foster Parents: agency providing information to a foster parent about a foster child shall inform the foster parent of the requirement that they must comply with federal and Wisconsin confidentiality laws.
s. HFS 39.08(4)	Relinquishing Custody of a Newborn Child: person receiving information about a newborn shall keep the information confidential and only disclose as permitted under s. 48.195(2)(d).
Ch. HFS 51 s. HFS 53.06	Adoption of Children with Special Needs  Adoption Information Search and Disclosure: release of adoption information; DHFS and agencies shall comply with Wisconsin statutes, administrative rules and federal regulations governing confidentiality and only release information as permitted under ss. 48.432 and 48.33 and others.
s. HFS 90.12(3)	Early Intervention Services for Children from Birth to Age 3 with Developmental Needs: personally identifiable information regarding children, parent and other family members is confidential at all stages of record development and maintenance. <ul style="list-style-type: none"> <li>▪ Parents have access</li> <li>▪ County administrative agency and service providers have access without a signed authorization of the parent</li> </ul>
s. HFS 145.04 (1)	Responsibilities for Reporting: mandatory reporting of communicable diseases by health care providers, educational professionals., etc., disease information used only for legally authorized public health activities; information is confidential but for use in investigating and controlling communicable diseases.
<b>WISCONSIN STATUTES</b>	<b>INFORMATION COVERED</b>
s. 6.47(2)	Address of victim of domestic abuse cannot be revealed by municipal clerk or election official except to law enforcement officer, pursuant to court order, or other reason under s. 6.47.
s. 51.44 (5)	Birth to three records. Records governed by s. 51.30 (4)



### **SECTION 3: TERMINOLOGY**

#### **LEGAL DEFINITIONS OF RECORDS-RELATED TERMS**

##### **Discussion**

Many survey respondents expressed frustration that definitions of records-related terms are not included in a single chapter of the Wisconsin Statutes. Chapters that deal with records sometimes define numerous records-related terms while others contain very few definitions. Some statutes require the reader to review other statutes to understand the terminology.

Chapter 19, General Duties of Public Officials: Public Records and Property, includes definitions relating to records maintained by a public entity, as defined in that chapter. Most persons refer to Ch. 19 as the “open records” law. Ch. 19 definitions provide an overall picture as to how the Wisconsin legislature defines records-related terms. However, when the definition of a records-related term in a specific confidentiality law differs from that in s. 19.32, the definition in the applicable confidentiality law controls. See chapters 4 through 8.

Under Chapter 19, any individual may request information contained in a public record. Records custodians must follow the procedures in Chapter 19 to respond. However, confidential information protected by another specific law cannot be disclosed under Chapter 19. For example, s. 51.30, Wis. Stats., protects mental health information and s. 118.125, Wis. Stats. protects education information from disclosure under an open records request without a written authorization, legal exception, or court order.

##### **Records Definitions Under Chapter 19**

- “Authority” means any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order; a governmental or quasi-governmental corporation. s. 19.32 (1)
- “Record” means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. s. 19.32(2)
- “Record” includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts and optical disks. s. 19.32(2)
- “Record” does **not** include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library. s. 19.32 (2) [emphasis added]
- “Record subject” means an individual about whom personally identifiable information is contained in a record. s. 19.32 (2g)
- “Personally identifiable information” means information that can be associated with a particular individual through one or more identifiers or other information or circumstances. s. 19.32 (2r)

## **GUIDE TERMINOLOGY**

As indicated previously, confidentiality laws are complex and inconsistent. Terminology used within the laws varies. The section below provides the reader with definitions of terms used in a consistent way within the Guide. Familiarity with the terms may prove useful when reading the remainder of the chapters.

- “Authorization”
  - Laws use various terms to refer to the decision of an individual to permit a holder of confidential information to communicate that information to another person or entity. The Guide uses the term “authorization” when referring to a decision by the subject to give an “informed consent” or to agree to the “release/disclosure” of information.
  - What laws refer to as a document of “informed consent” or a “release of information” is termed an “authorization” in the Guide.
  - The statement that an individual/entity “can legally disclose information without an authorization” means that a statutory exception or court order permits the disclosure without a written authorization signed by the subject of the information or a person legally authorized to act on behalf of that person such as a parent for a child. In other words, “without authorization” does **not** mean an illegal sharing of information.
- “Need to know” refers to an internal job-related need to know certain confidential information to perform a specific job function. A need to know is a “use” of information permitted under privacy laws without the authorization of the subject. It usually includes the concept of “minimally necessary” to perform the job function.
- “Record” refers to information recorded in any format or verbally communicated. It is not limited to a physical recording of some type, unless specifically stated. Generally, the Guide uses the term “information” instead of “record” to reflect both physical records and verbal communications.
- “Subject of the information” is sometimes meant to include not only the individual to which the information applies, but to an individual authorized to act on behalf of the subject such as the parent of a minor or health care agent of a patient under an activated Power of Attorney for Health Care.
- “Use” and “Disclosure” are HIPAA-related terms. Other privacy laws, generally pre-HIPAA, use the term “release” when referring to a communication of information from the holder of the information to an individual or entity outside of the agency with custody of the information. Those laws typically include an exception that permits access (use) by employees, without the authorization of the subject, who have a defined need to know the information to perform a job function.
  - For consistency, the Guide employs “disclosure” for communication of information outside of the agency or other entity. The term “use” refers to communication of information within an agency or other entity.
  - Sharing of information within an agency/entity with a person without a job-related need to know the information is not a proper “use” and would require a written authorization. This explains the inclusion at some points in the Guide of the terminology “authorization for use and disclosure” of information.”

## **SECTION 4: PATHS TO LEGAL DISCLOSURE**

### **OVERVIEW**

- Written Authorization
- Exception Under an Applicable Law (other than a court order)
- Court Order

Privacy laws begin by stating that the holder of the information shall maintain the confidentiality of the information, unless the subject of the information authorizes disclosure. Each law lists the exceptions to that requirement. The tables in Chapters 4 through 8 describe the exceptions to the authorization requirement for the law being discussed.

### **WRITTEN AUTHORIZATION: CHAPTER 9**

The subject of the information, or a person authorized to act on behalf of the subject, has the legal right to authorize the disclosure of information to a person or entity named in a written authorization. Chapter 9 describes the elements of written authorizations for specific types of information. In addition, it includes a table that explains who has legal access to specific types of information and the right to sign an authorization as the subject or on behalf of the subject.

### **LEGAL EXCEPTIONS (OTHER THAN COURT ORDERS): CHAPTERS 4 THROUGH 8**

Confidentiality laws identify specific exceptions to the requirement that the holder of the information obtain written authorization from the subject, or from a person authorized to act on behalf of the subject, prior to disclosing information. See the following chapters for detailed discussions of the legal exceptions:

- Chapter 4: Information Regarding Child Abuse/Neglect Under S. 48.981, Wis. Stats.
- Chapter 5: Information Under Chapter 48 and Chapter 938, Wisconsin Statutes
- Chapter 6: Health Information Under Wisconsin and Federal Laws
- Chapter 7: Pupil/Education Information Under Wisconsin and Federal Laws
- Chapter 8: Information Under Chapter 46, Social Services and Chapter 49, Public Assistance

### **COURT ORDERS**

Most privacy laws include an exception for a court order. An individual or agency that wishes to obtain a court order signed by a judge that authorizes disclosure of specified confidential information can apply to the court for the order. The order applies only to the information identified in the Order signed by a judge.

Most statutes do not identify the exact standards that a judge must follow prior to issuing an Order. However, 42 C.F.R. Part 2, Confidentiality of Alcohol and Drug Abuse Patient Information, lays out the precise standards to which a judge must adhere prior to issuing an Order authorizing disclosure of AODA information. They place stringent requirements on the court.

A subpoena or a discovery request issued by an attorney does not have the same force of law as a court order signed by a judge under Wisconsin privacy laws. Note that under Chapter 51 and Chapter 146, neither is adequate to authorize disclosure. They require a court order signed by a judge.

## **SUMMARY**

A records custodian can legally disclose outside the agency confidential information only under one of the three circumstances described above. If there is not a proper authorization, an exception under the applicable privacy law, or a court order, disclosure is illegal. If more than one law applies to a particular type of information, the one providing the most privacy protection and greatest access to the subject governs. Individuals and employing entities can face financial penalties, imprisonment, and employee discipline for violating the confidentiality rights of an individual as described in Chapter 11. Proper use within an agency depends on the need to know the information to perform a job function.

## **SECTION 5: DETERMINATION OF APPLICABLE LAWS**

### **INFORMATION NEEDED**

To answer the seemingly easy questions: *"What requirements must be met before I may legally disclose information to particular entity?"* or *"What requirements must be met before I may legally obtain information from a particular entity?"*, one must identify what type of information is being sought, who is the subject of the information, who is requesting the information, and who maintains the information. Being able to answer the questions below will assist the reader to locate the chapter(s) most likely to contain information relevant to his or her situation.

### **WHICH GUIDE CHAPTER DISCUSSES A PARTICULAR TYPE OF INFORMATION?**

- Information maintained under s. 48.981, regarding child abuse and neglect: Chapter 4
- Information maintained by agencies under Chapters 48 and 938: Chapter 5
- Court records governed by Chapters 48 and 938: Chapter 5
- Law enforcement agency records governed by Chapters 48 and 938: Chapter 5
- Medical (physical health) information: Chapter 6
- Mental health/developmental disabilities information: Chapter 6
- Alcohol/drug abuse information: Chapter 6
- HIV test results: Chapter 6
- Education/Pupil records (including limited health information): Chapter 7
- Information regarding applicant/recipient of services under Chapters 46 and 49, Wis. Stats.: Chapter 8

### **WHO IS THE SUBJECT OF THE INFORMATION?**

The chapter(s) noted after each individual listed below identify the chapter(s) most likely to apply to that individual.

- Minor under 18 years old: Chapters 4 - 8
- Minor 14 through 17 years old: Chapters 4, 5 and 6
- Adult: Chapters 4 - 8
- Parent, guardian, or legal custodian of a minor: Chapters 4 - 8
- Deceased minor: Chapter 6
- Deceased adult: Chapter 6
- Minor or adult student: Chapter 7
- Adjudicated delinquent: Chapters 5 and 6
- Person alleged to have abused/neglected a minor: Chapter 4

- Minor placed in an out-of-home setting under Chapter 48 or 938: Chapters 4 and 5
- Minor committed to a secured juvenile correctional facility under Chapter 938: Chapter 5
- Prisoner in a Department of Corrections facility: Chapter 6
- Probationer/parolee: Chapter 6
- Person committed under Chapter 51: Chapter 6.
- Person with a court-appointed guardian of the person under Chapter 880: Chapter 6
- Person applying for/receiving services from governmental agency: Chapter 8

#### **WHO IS REQUESTING THE INFORMATION?**

Any of the individuals below may request information contained in records discussed in Chapters 4 through 8. Identification of the requester is necessary to determine the legal requirements that must be met for the individual to obtain the information being sought.

- Subject of the information
- Parent, guardian or legal custodian of a minor
- Minor: individual under 18 years old
- Court-appointed guardian of the person
- Agent acting under an activated Power of Attorney for Health Care
- Health care (treatment) provider (physical health, mental health, AODA)
- Insurer paying for health services
- Attorney (district attorney, corporation counsel, subject's attorney, guardian ad litem, or opposing counsel in a civil proceeding)
- Court (Children's, family, probate, civil, criminal)
- State agency such as DHFS and DOC
- County agency: Department of Social/Human Services
- Private and/or non-profit agency providing services to children and families
- Law enforcement officer
- Education professional
- Citizen
- Media

#### **WHO HAS THE INFORMATION?**

Persons seeking information must identify the entity with the information. The chapter(s) listed after each entity indicate the primary chapter(s) in which records maintained by the entity are discussed.

- Health care (treatment) provider: Chapter 6
- Insurance agency paying for health services: Chapter 6
- Attorney (district attorney, corporation counsel, subject's attorney, guardian ad litem, or opposing counsel in a civil proceeding):
- Court (Children's, family, probate, civil, criminal): Chapters 4 and 5
- State agency such as DHFS and DOC: Chapters 4, 5, 6 and 8

- County agency: Department of Social/Human Services: Chapters 4, 5, 6 and 8
- Private and/or non-profit agency providing services to children and families: Chapter 5, 6 and 8
- Law enforcement officer/agency: Chapters 4 and 5
- Education professional/facility: Chapter 7

**CHAPTER 4**

**REPORTING OF CHILD ABUSE AND NEGLECT  
AND DISCLOSURE OF INFORMATION UNDER S. 48.981, WIS. STATS.**

**CHAPTER SUMMARY**

**Section 1**

Answers the following questions related to reporting of child abuse/neglect under s. 48.98:

- Who are mandated/required reporters of child abuse/neglect?
- Which statutory provisions make them mandated reporters?
- Which laws govern the type of records maintained by mandated reporters and permit them to disclose information for reporting?
- What are the exceptions to mandatory reporting requirements?

Includes Table 1: Mandated Reporters and Laws Governing Their Records

**Section 2**

Describes the legal disclosure of information that an agency receiving reports of child abuse and neglect may make as depicted in Table 2: Disclosure of Information in Reports, Notices and Records Under S. 48.981.

**SECTION 1: REPORTING ABUSE AND NEGLECT**

**REQUIRED REPORTERS**

Wisconsin law at s. 48.981 (2) requires the named professionals to report information about child abuse and neglect, and threatened child abuse and neglect. The law requires reporting by any mandated reporter who has reasonable cause to suspect that a child seen by the person in the course of professional duties has been abused or neglected, or who has reason to believe that a child seen by the person in the course of professional duties has been threatened with abuse or neglect and that abuse or neglect of the child will occur.

The legislature determined that the public interest in protecting children from abuse and neglect supersedes the right of privacy generally afforded to the subject of confidential information. Federal privacy laws have reached the same conclusion when balancing those competing interests.

Many privacy laws include a specific exception for the reporting of child abuse and neglect without a written authorization. For example, s. 51.30 (4)(b) governing mental health information includes a specific exception for the reporting of child abuse/neglect. The fact that a Wisconsin or Federal law governing a specific type of information does not include a clearly stated exception for reporting abuse/neglect DOES NOT relieve a mandated reporter under s. 48.981, from the legal obligation to report.

# TABLE 1: MANDATED REPORTERS AND THE LAWS GOVERNING THEIR RECORDS

The first column in the table lists mandated reporters by professional categories. The citation at the end of each section in that column refers to the s. 48.981 provision that identifies that professional as a mandated reporter.

The second column identifies the law that protects the confidentiality of the type of information created by or held by the professional(s) named in the first column. If that law includes a stated exception for reporting, the citation is included. To repeat, **a mandated reporter under s. 48.981 shall report even if the law governing the information she/he creates/maintains does not include a specific statutory exception for reporting.**

*Appendix 1 provides a stand-alone version of Table 1 in a larger font.*

MANDATED REPORTERS	LAWS GOVERNING RECORDS
<ul style="list-style-type: none"> <li>Physician</li> <li>Nurse</li> <li>Dentist</li> <li>Chiropractor</li> <li>Optometrist</li> <li>Acupuncturist</li> <li>Medical professional not otherwise specified</li> <li>Physical therapist and assistant</li> <li>Occupational therapist</li> <li>Dietitian</li> <li>Speech-language pathologist</li> <li>Audiologist</li> </ul> <p>ss. 48.981(2)(a)1., 4., 5., 6., 7., 8., 9. 22, .22m., 23., 24., 25. &amp; .26.</p>	<ul style="list-style-type: none"> <li>s. 146.82 governs confidentiality of health care records.</li> <li>45 C.F.R. Part 164 governs confidentiality of protected health information.</li> <li>s. 146.82 (2)(a)11. and 45 C.F.R. 164.512(c) state an exception that authorizes reporting of child abuse/neglect without authorization of the subject.</li> </ul>
<p>Professionals who provide treatment for mental illness, developmental disabilities and alcohol and drug abuse including:</p> <ul style="list-style-type: none"> <li>Social worker</li> <li>Marriage and family therapist</li> <li>Professional counselor</li> <li>Alcohol/drug abuse counselor</li> <li>Mental health professional not otherwise specified in s. 48.981(2)</li> </ul> <p>ss. 48.981(2)(a)10., 11. &amp; 12.</p>	<ul style="list-style-type: none"> <li>s. 51.30(4) governs the confidentiality of records relating to mental health, developmental disabilities and alcohol/drug abuse.</li> <li>42 C.F.R. Part 2 governs information relating to alcohol and drug abuse</li> <li>s. 51.30 (4)(b)17. and 42 C.F.R. s. 2.12(c)(6) state an exception that authorizes reporting of child abuse and neglect without written authorization by subject.</li> </ul>

**Table 1 Continued**

<ul style="list-style-type: none"> <li>Coroner</li> <li>medical examiner</li> </ul> <p>ss. 48.981(2)(a)2. &amp; 3.</p>	<ul style="list-style-type: none"> <li>s. 146.82 governs records prepared by physicians</li> <li>s. 146.82 (2)(a)11. authorizes reporting of child abuse and neglect without consent of the subject of the information.</li> </ul>
<ul style="list-style-type: none"> <li>Emergency medical technician</li> <li>First responder</li> </ul> <p>ss. 48.981(2)(a)27. and 28</p>	<ul style="list-style-type: none"> <li>s. 146.50(12) includes EMTs/1st responders as health care providers for ensuring confidentiality of health information under s. 146.82.</li> <li>s. 146.82(2)(a)11. and 45 C.F.R. s. 164.512(c) authorize reporting of child abuse and neglect without authorization of the subject of the information.</li> </ul>
<ul style="list-style-type: none"> <li>Police/law enforcement officer</li> </ul> <p>s. 48.981(2)(a)29.</p>	<ul style="list-style-type: none"> <li>s. 938.396 and s. 48.396 govern law enforcement records relating to juveniles and children</li> <li>Statutes above do not include a specific exception that authorizes reporting of child abuse/neglect, but <u>s. 48.981 requires reporting</u>.</li> </ul>
<ul style="list-style-type: none"> <li>Education professionals</li> <li>School teacher</li> <li>School administrator</li> <li>School counselor</li> </ul> <p>s. 48.981(2)(a)14., 15 &amp; 16.</p>	<ul style="list-style-type: none"> <li>s. 118.125 and 34 CFR Part 99 (FERPA) govern confidentiality of educational records.</li> <li>34 CFR s. 99.36 includes an exception to the authorization requirement for disclosures necessary to protect the health or safety of a student or others. [NOTE: This exception covers abuse/neglect reporting]</li> <li>s. 48.981 requires reporting in Wisconsin; does not authorize disclosure of pupil records</li> </ul>
<ul style="list-style-type: none"> <li>Child-care worker in a day care center</li> <li>Day care provider</li> <li>Residential care center worker</li> </ul> <p>s. 48.981(2)(a)18. and 19.</p>	<ul style="list-style-type: none"> <li>s. 48.78 governs records of a licensed child welfare agency or day care center</li> <li>Statute above does not include an exception for reporting of child abuse/neglect, but <u>s. 48.981 requires reporting</u></li> </ul>
<ul style="list-style-type: none"> <li>Treatment staff employed by or under contract with a county department under s. 46.23, 51.42 or 51.437</li> <li>Residential care center for children/youth.</li> </ul> <p>s. 48.981(2)(a)21.</p>	<ul style="list-style-type: none"> <li>s. 146.82 or s. 51.30(4) govern records depending on type of information being disclosed.</li> <li>s. 146.82(2)(a)11. and s. 51.30(4)(b)17. authorize reporting of child abuse and neglect.</li> </ul>
<ul style="list-style-type: none"> <li>Court appointed special advocate.</li> </ul> <p>s. 48.981(2)(b)</p>	<ul style="list-style-type: none"> <li>s. 48.236(4)(a) governs confidentiality of all information gathered by advocate.</li> <li>Statute does not include an exception that authorizes reporting of child abuse and neglect, but <u>s. 48.981 requires reporting</u></li> </ul>



**Table 1 Continued**

<ul style="list-style-type: none"> <li>▪ Mediator in family court matter. s. 48.981(2)(a)17.</li> </ul>	<ul style="list-style-type: none"> <li>▪ s. 767.11 describes duties of a mediator.</li> <li>▪ Statute does not include an exception that authorizes reporting of child abuse and neglect, but <u>s. 48.981 requires reporting</u></li> </ul>
<ul style="list-style-type: none"> <li>▪ Public assistance worker including a financial and employment planner s. 48.981(2)(a)13</li> </ul>	<ul style="list-style-type: none"> <li>▪ Chapter 49 governs records created and maintained by a public assistance worker</li> <li>▪ S. 48.981 requires the worker to report</li> </ul>
<ul style="list-style-type: none"> <li>▪ Clergy s. 48.981(2)(bm) [under limited circumstances]</li> </ul>	<ul style="list-style-type: none"> <li>▪ Policies of religious organization.</li> </ul>
<b>VOLUNTARY REPORTERS</b>	
<b>Any person may report</b> abuse/neglect or suspected abuse/neglect of a child or unborn child, including an attorney. s. 48.981(2)(c)	
<b>EXCEPTION TO REPORTING REQUIREMENT</b>	
<p>If providing minors with family planning services, pregnancy testing, obstetrical care and diagnosis/treatment for sexually transmitted disease, physicians, physician's assistants and nurses certified/registered under Ch. 441 or Ch. 448 and others obtaining information about minors receiving those health care services do <b>NOT</b> have to report, <u>except</u> as described below. s. 48.981(2m)(c)</p> <p>The above-described persons under s. 48.981 (2m)(c) must report under the following circumstances. s. 48.981(2m)(d) and (e)</p> <ol style="list-style-type: none"> <li>1. Sexual intercourse or sexual contact occurred or is likely to occur with a caregiver.</li> <li>2. Child suffered or suffers from a mental illness/mental deficiency that rendered or renders the child temporarily or permanently incapable of understanding or evaluating the consequences of his or her actions.</li> <li>3. Because of his or her age or immaturity, child was or is incapable of understanding the nature or consequences of sexual intercourse or sexual contact.</li> <li>4. Child was unconscious at the time of the act or for any other reason was physically unable to communicate unwillingness to engage in sexual intercourse or sexual contact.</li> <li>5. Another participant in the sexual contact or sexual intercourse was or is exploiting the child.</li> <li>6. Any reasonable doubt as to the voluntaries of the child's participation.</li> </ol>	

## **SECTION 2: DISCLOSURE OF INFORMATION**

### **DISCUSSION**

For purposes of s. 48.981, an "agency" means a county department, the department in a county having a population of 500,000 or more or a licensed child welfare agency under contract with a county department or the department in a county having a population of 500,000 or more to perform investigations under this section. s. 48.981(1)(ag)

Reports made under s. 48.981, notices provided to an Indian tribal agent, and records maintained by an agency, other persons, officials and institutions shall be confidential. Reports and records may be disclosed without authorization of the subject of the reports/record **only** to the persons/entities as permitted under s. 48.981(7). s. 48.981(7)(a)

A recipient of a record or report shall not further disclose, except as permitted under s. 48.981. Unlike most laws, this statute limits the authority of an adult subject or parent, guardian, or

foster parent of a minor to authorize disclosure by the agency. It identifies the limited circumstances under which an individual may authorize an agency to disclose to others. s. 48.981(7)(e) The statute also restricts disclosure to ensure that the information revealed does not include information that would reveal the identity of a reporter. Those provisions are marked with an asterisk in Table 2.

**TABLE 2: DISCLOSURE OF INFORMATION IN REPORTS, NOTICES AND RECORDS UNDER S. 48.981**

The table describes the disclosures that an agency receiving reports under s. 48.981, may make without obtaining a written authorization from the subject of the information. Each row identifies an authorized recipient. *Appendix 2 provides a stand-alone version of Table 2 in a larger font.*

<b>TO SUBJECT, REPORTER AND PARENT</b>	
*Agency to subject of the report without identifying the reporter. s. 48.981(7)(a)1.	
*Agency to parent, guardian, legal custodian, foster parent, treatment foster parent or other person with physical custody of the child, or expectant mother or person with custody of expectant mother without identification of reporter. s. 48.981(7)(a)3m. and 4.	
*Agency to reporter, who is a relative, upon written request, information only regarding what action, if any, was taken (unless prohibited by a court order) and without identification of reporter. s. 48.981(7)(a)1m.	
*Either parent may authorize disclosure for use in child custody/adoption proceeding without identification of reporter. s. 48.981(7)(b)	
*Subject of report may authorize disclosure to subject's attorney without identifying reporter. s. 48.981(7)(c)	
<b>TO LAW ENFORCEMENT/COURTS/ATTORNEYS</b>	
Agency to law enforcement and District Attorney for investigation/prosecution. s. 48.981(7)(a)8.	
For proceedings under s. 48.25(6), CHIPS, and s. 813.122, Temporary Restraining Order, or 813.125, injunction. s. 48.981(7)(cm)	
Court or administrative agency for licensing or regulation of a facility under this chapter. s. 48.981(7)(a)9.	
Grand jury when needed to perform duties. s. 48.981(7)(a)14.	
Judge under s. 968.26. s. 48.981(7)(a)14m	
Court conducting certain proceedings under ch. 48 and 938 and county corporation counsel/DA, agency legal counsel or Guardian ad litem. ss. 48.981(7)(a)10., 10g., 10j., and 11.	
<b>TO SOCIAL/HUMAN SERVICES, COURT, MEDICAL AND OTHER PROFESSIONALS</b>	
Tribal court or other adjudicative body authorized by a tribe/band for certain proceedings, an attorney representing interests of an Indian tribe/band, and an attorney representing the child or unborn child in such proceedings. ss. 48.981(7)(a)10m., 10r. and 11m.	
Appropriate staff of an agency/tribal social services department. s. 48.981(7)(a)2.	
DOC, DHFS, county department or other person under contract who has custody/supervision over a child in a community placement. s. 48.981(7)(a)8m.	

**Table 2 Continued: To Social Services/Court/Medical and Other Professionals**

DHFS any report or record maintained by an agency under s. 48.981. s. 48.981(7)(d)
Person authorized to provide intake/dispositional services under s. 48.067, 48.069, 48.10, 938.067, 938.069 or 938.10. ss. 48.981(7)(a)2m. and 2r.
Professional under s. 51.42 or s. 51.437 working with the child or expectant mother. s. 48.981(7)(a)5.
Attending physician for diagnosis/treatment. s. 48.981(7)(a)3. Coroner, medical examiner, pathologist or other physician to investigate cause of death of child when unexplained/unusual. s. 48.981(7)(a)15m
Federal or state agency of any state or local governmental unit when needed to carry out responsibilities relating to protection of a child/unborn child from abuse/neglect. s. 48.981(7)(a)17.
<b>TO AUTHORIZED ADVOCATES AND TEAMS</b>
Volunteer court appointed special advocate to perform advocacy services. s. 48.981(7)(a)11r.
Child advocacy center. s. 48.981(7)(a)6m.
Multidisciplinary child abuse/neglect or unborn child abuse team. s. 48.981(7)(a)6.
Child fatality review team, citizen review panel. ss. 48.981(7)(a)15. and 15g.
<b>MISCELLANEOUS</b>
Researcher with proper authorization from DHFS, except that the reporter cannot be identified. s. 48.981(7)(a)12.
General public, under specified conditions, certain information when a child has died or been placed in serious/critical condition. s. 48.981(7)(cr)

**CHAPTER 5****RECORDS MAINTAINED UNDER CHILDREN'S CODE (CH. 48)  
AND JUVENILE JUSTICE CODE (CH. 938)****CHAPTER 48**

Chapter 48, Children's Code, of the Wisconsin Statutes, has the primary purposes of protecting children and unborn children and preserving the unity of the family whenever appropriate. Courts and agencies responsible for the welfare of children recognize that a child may have to be placed outside of the family to protect the child from harm. Important terms include:

- "Agency records" under s. 48.78(1) are confidential records kept or any information received by the DHFS, county department, a licensed child welfare agency, or a licensed day care center about an individual in its care or legal custody.
- "Law enforcement officers' records" under s. 48.396(1) are confidential records of children that must be kept separate from records of adults, and records of adult expectant mothers of unborn children that must be kept separate from records of other adults.

- “Court records” under s. 48.396(2) include confidential records maintained by courts with jurisdiction under Chapter 48 or 938.
- “Child abuse/neglect records” under s. 48.981(7) include reports made, notices provided and records maintained by an agency and other persons, officials, and institutions. [Not governed by ss. 48.78 or 48.396 discussed in this chapter. [See Chapter 4]

## **CHAPTER 938**

Chapter 938, Juvenile Justice Code, has as its purpose the maintenance of a juvenile justice system that deals with the problem of juvenile delinquency, protects the public, equips delinquents with competencies to live responsibly and holds delinquents accountable for their actions. Important terms include:

- “Agency records” under s. 938.78 include records kept or information received by Department of Corrections (DOC), a county department or a licensed child welfare agency about an individual in its care/legal custody.
- “Law enforcement officers’ records” under s. 938.396(1) are confidential records of juveniles maintained by a law enforcement agency that must be kept separate from records of adults.
- “Court records” under s. 938.396(2) include confidential records maintained by courts with jurisdiction under Chapter 48 or 938, and municipal courts with jurisdiction under s. 938.17(2).
- “Department of Corrections records” under s. 938.54 include information received from the court, date of admission, all available data on the person/family, history of the juvenile, results of tests/examinations and history of all placements while a juvenile is under DOC supervision.

## **RE-DISCLOSURE**

Chapters 48 and 938 place limitations on re-disclosure of information:

- A social welfare agency receiving information shall maintain its confidentiality per s. 48.78 and s. 938.78. [“Social welfare agency” is not defined.]
- Law enforcement agencies receiving information shall maintain that information as confidential under ss. 48.396(1) and 938.396(1).
- Schools receiving information shall keep that information confidential as required under s. 118.125.

## **DETERMINATION BY A COURT**

The juvenile court judge must make a threshold relevancy determination by reviewing the requested records in private when the court receives a discovery request under s. 48.293(2), an inspection request of juvenile records under ss. 48.396 (2) (a) and 938.396 (2) (a), or an inspection request of agency records under ss. 48.78 (2) (a) and 938.78(2) (a). The test for permissible discovery is whether it appears reasonable that the information sought will lead to the discovery of admissible evidence.

**TABLE 3: PERMITTED DISCLOSURES UNDER CHAPTER 48 AND 938 WITHOUT AUTHORIZATION OF SUBJECT OF INFORMATION, OR PARENT/GUARDIAN**

The 1<sup>st</sup> column describes legal disclosures of information from agency, law enforcement and court records under Chapter 48 without written authorization. The 2<sup>nd</sup> column describes legal disclosures of information from agency, law enforcement and court records under Chapter 938 without written authorization. *Appendix 3 provides a stand-alone version of Table 3 in a larger font.*

S. 48.78	S. 938.78
<b>AGENCY RECORDS</b>	
Exchange of information permitted between an agency and another social welfare agency, law enforcement agency and public/private school regarding an individual in the care or legal custody of the agency, but each recipient must maintain confidentiality. s. 48.78(2)(b) [Note: "social welfare agency" is not defined.]	Exchange of information permitted with an agency, social welfare agency, law enforcement agency, victim-witness coordinator, fire investigator, public school district or private school regarding an individual in the care or legal custody of the agency, but each recipient must maintain confidentiality. s. 938.78(2)(b) [Note: broader provision than under s. 48.78(2)(b)]
Use of media to recruit adoptive parents by DHFS or county department. s. 48.78(2)(c)	Interagency agreement may be entered with agency, school board, private school, law enforcement agency and another social welfare agency for <b>routine</b> disclosure of information. s. 938.78(2)(b)1m. [Note: same provision <b>not</b> included in s. 48.78.]
Upon request by Department of Regulation and Licensing or other examining board for proceeding regarding alleged misconduct by a licensed or credentialed person. s. 48.78(2)(g)	s. 938.78(2)(g): same as s. 48.78 (2)(g)
DHFS or county department to Department of Corrections about individual under pre-sentence investigation, sentenced to prison, or on probation or parole. s. 48.78(2)(d)	s. 938.8(2)(d): same as s. 48.78(2)(d)
<b>LAW ENFORCEMENT OFFICERS' RECORDS</b>	
Court order. s. 48.396 (1)	s. 938.396 (1): same as s. 48.396 (1)
News media to report without revealing identity. s. 48.396 (1)	s. 938.396 (1): same as s. 48.396 (1)
Between police and child's school of attendance. s. 48.396 (1)	s. 938.396 (1): same as s. 48.396 (1)
Other law enforcement agencies. s. 48.396 (1)	s. 938.396 (1): same as s. 48.396 (1)
Social welfare agencies. s. 48.396 (1)	s. 938.396 (1): same as s. 48.396 (1)
Child aged 10 or over who is subject of criminal proceedings. s. 48.396 (1)	s. 938.396 (1): same as s. 48.396 (1)

**Table 3: Law Enforcement Officers' Records Continued**

<b>S. 48.78</b>	<b>S. 938.78</b>
Per request of the pupil aged 14 years or older, parent/guardian/legal custodian of pupil, or of a child expectant mother, or of the GAL for an unborn child per agency policy. s. 48.396(1b)	Per request of pupil 14 years and older or parent/guardian/legal custodian per agency policy. s. 938.396 (1b)
Per written authorization of the child aged 14 years or older, the parent/guardian/legal custodian of the child, or the GAL for an unborn child to a named person per agency policy. s. 48.396 (1d)	Per written authorization of a juvenile 14 years and older, or the parent/guardian/legal custodian of juvenile to a named person per agency policy. s. 938.396 (1d)
<b>Denial of access:</b> Person denied access to law enforcement records under s. 48.396 (1), (1b) or (1d) may petition court to order disclosure. s. 48.396(5)	Law enforcement agency may enter into interagency agreement with a school board, private school, other law enforcement agency and a social welfare agency for routine disclosures. s. 938.396 (1p)
<u>END</u>	To Department of Justice, DA, judge and legal counsel for subject in a Ch. 980 commitment proceeding. s. 938.8(2)(e)
	On own or per request of school administrator agency may disclose information regarding a student's use/distribution/possession of alcohol or controlled substances, possession of a dangerous weapon, taking into custody under s. 938.19 and delinquency adjudication. s. 938.396 (1m)(a),(1m)(am),(1m)(ar) and (1m)(b)
	Law enforcement or fire investigator may petition the court to order school to permit review of pupil records under s. 118.125. s. 938.396 (1m)(c) and (1m)(d)
	Upon request of fire investigator. s. 938.396 (1x)
	Agency may petition to court for order to review pupil record under s. 118.125(1)(d) for purpose of providing treatment/care. s. 938.78(2)(b)2.
	Upon request of a victim may disclose limited information relating to injury/loss. s. 938.396 (1r)
	Request of victim-witness coordinator for enforcing victim rights and providing services. s. 938.396 (1g)
	Request of victim's insurer if juvenile fails to pay restitution within one year after entry of order. s. 938.396 (1t)
	<b>Denial of access:</b> Person denied access to law enforcement records under s. 938.396 (1), (1b), (1d), (1g), (1m), (1r) or (1t) may petition court to order disclosure. s. 938.396 (5)

**Table 3 Continued**

<b>S. 48.396</b>	<b>S. 938.396</b>
<b>COURT RECORDS</b>	
Court order. s. 48.396(2)(a)	s. 938.396 (2)(a) same as 1 <sup>st</sup> column
Per request of parent/guardian/legal custodian of juvenile, or juvenile 14 years and older to review court records. s. 48.396 (2)(ag)	s. 938.396 (2)(ag) same as 1 <sup>st</sup> column
Per written authorization of parent/guardian/legal custodian of juvenile, or juvenile 14 years and older to disclose to others. s. 48.396 (2)(am)	s. 938.396 (2)(am) same as 1 <sup>st</sup> column
Request of DHFS or federal agency to monitor and evaluate activities as required by law. s. 48.396(2)(b)	s. 938.396 (2)(b) same as 1 <sup>st</sup> column
Request of court handling actions affecting the family, attorney enforcing support obligations and parties in a paternity action. s. 48.396(2)(dm)	s. 938.396 (2)(g) same as 1 <sup>st</sup> column

## CHAPTER 6 HEALTH INFORMATION

### CHAPTER SUMMARY

#### Section 1

Describes Wisconsin and federal privacy laws including important terms used in those laws:

- Miscellaneous Health Care Provisions
- Wisconsin Mental Health, Developmental Disability and Alcohol and Other Drug Abuse Act
- Communicable Diseases
- Confidentiality of Alcohol and Drug Abuse Patient Records
- Health Insurance Portability and Accountability Act (HIPAA)
- Pupil Records

#### Section 2

Explains the purpose of and how to use Table 4 regarding permitted disclosures of health information without a signed authorization by the subject or person authorized to act on behalf of the subject. Includes lengthy table that presents by topic the statutory exceptions to the requirement of written authorization under Wisconsin statutes and federal regulations.

#### Section 3

Provides information about the various types of privileges that may be waived under certain circumstances. None of the privileges is absolute.

## **SECTION 1: PRIVACY LAWS**

### **INTRODUCTION**

Federal and Wisconsin laws divide health information into categories. Privacy protections vary depending on the type of health information. Laws that govern the disclosure of confidential health information contain exceptions to the requirement that the subject of the information, or someone authorized to act on his/her behalf, consent in writing to the disclosure of confidential information to another person. Each law includes its own exceptions that may be the same as or different from exceptions under other laws. The large number of exceptions and inconsistencies among the laws makes it quite challenging to determine who can disclose what information, to whom, and under what circumstances without a written authorization.

The information regarding the applicable laws, definitions of essential terms, and Table 4 cannot answer all questions regarding the communication of health information. However, this chapter attempts to offer initial guidance to holders and seekers of various types of health information.

### **WISCONSIN AND FEDERAL LAWS APPLICABLE TO HEALTH INFORMATION**

#### **Miscellaneous Health Care Provisions: Chapter 146, Wisconsin Statutes**

##### Discussion

Sections 146.81 through 146.84 govern the confidentiality of health care records prepared by or under the supervision of a health care provider. Section 146.81 (1) defines health care providers under Wisconsin law. S. 146.81(4) describes records that are and are **not** governed by these statutes. Section 146.82 includes 21 exceptions to the requirement that the subject sign a written authorization, s. 146.83 describes procedures for accessing records, and s. 146.84 explains the penalties for violating the law.

##### Definitions

- "Records" include those on which written, drawn, printed, spoken, visual, electromagnetic or digital information is recorded or preserved, regardless of physical form or characteristics. s. 146.836
- "Patient health care records" means all records related to the health of a patient prepared by or under the supervision of a health care provider, including the records required under s. 146.82 (2) (d) and (3) (c), but **NOT** those records subject to s. 51.30, reports collected under s. 69.186, records of tests administered under ss. 252.15 (2) (a) 7., 343.305, 938.296 (4) or (5) or 968.38 (4) or (5), fetal monitor tracings, as defined under s. 146.817 (1), or a pupil's physical health records maintained by a school under s. 118.125. "Patient health care records" also includes health summary forms prepared under s. 302.388 (2). (emphasis added) s. 146.81(4)
- "Health care provider" means any of the professionals and other entities listed under s. 146.81. *See Appendix 4 that lists all the health care providers and can be printed as a stand-alone document.*
- "Informed consent" means written consent to the disclosure of information from a patient health care record by the subject to an individual, agency or organization by a document that meets specified standards. s. 146.81(2)



## **Wisconsin Mental Health, Developmental Disability and Alcohol and Other Drug Abuse Act, Chapter 51, Wisconsin Statutes, and Confidentiality of Patient Treatment Records, Chapter HFS 92, Wisconsin Administrative Code**

### Discussion

The statutory provisions under s. 51.30, control access to and disclosure of information related to treatment of mental health, developmental disabilities, and alcohol and drug abuse. Subsection (b)(1) defines records and (b)(2) states the requirements of an informed consent (authorization). Subsection (b)(3) discusses access to court records. Subsection (b)(4) governs access to treatment and registration records, including the 26 exceptions to the requirement that an authorization be obtained. Subsection 51.30 (4)(c) refers to federal regulations covering alcohol and drug treatment records; 42 C.F.R. Part 2. Subsection 51.30 (9) lists penalties for a violation of the protections of the laws. The administrative rules under s. HFS 92.02 track the language in s. 51.30 (4).

### Definitions

- “Records” include those on which written, drawn, printed, spoken, visual, electromagnetic or digital information is recorded or preserved, regardless of physical form or characteristics. s. 51.30(4)(g)
- “Treatment records” include the registration and all other records of individuals who are receiving or who at any time have received services for mental illness, developmental disabilities, alcoholism or drug dependence which are maintained by DHFS, county departments under s. 51.42 and s. 51.437 and their staff, and by treatment facilities, excluding notes/records for the personal use by any treatment provider, board or treatment facility. s. 51.30(1)(b) and s. HFS 92.02(16)
- “Informed consent” for disclosure of information from court or treatment records to an individual, agency, or organization must be in writing and must contain statutorily required information. s. 51.30(2)

## **Communicable Diseases: Chapter 252, Wisconsin Statutes and Chapter HFS 145, Wisconsin Administrative Code**

### Discussion

Chapter 252 deals with a variety of issues related to communicable diseases including the statewide immunization program, regulation of body piercing, duties of local health officers, and quarantine procedures. Section 252.21 (1) requires teachers, nurses and principals to report communicable diseases or suspected communicable diseases to the local health authority. Section 252.15 governs the confidentiality of HIV test results. It includes a list of exceptions to the authorization requirement as described in Table 4.

Section HFS 145.04, Reports of Communicable Disease, requires health care providers licensed under Chapters 441 and 448 to report cases of communicable diseases or suspected cases of communicable disease to the state epidemiologist. Section HFS 145.15 requires administrators of health care facilities, state correctional facilities and jails to report cases of sexually transmitted diseases to the local health officer. Section HFS 145.04 (d) states that all information provided under this subsection shall remain confidential except as may be needed for the purposes of investigation, control and prevention of communicable diseases.

## Definitions

- “Communicable disease” means a disease or condition listed in Appendix A of Chapter HFS 145. s. *HFS 145.03 (4)*
- “Informed consent for testing or disclosure” means consent in writing for testing or disclosure by a person to the administration of a test to him or her for the presence of HIV, antigen or nonantigenic products of HIV or an antibody to HIV, or to the disclosure to another specified person of the results of a test administered to the person consenting. s. *252.15 (1)(d)*
- “Immunization Program” means the statewide immunization program to eliminate mumps, measles, rubella (German measles), diphtheria, pertussis (whooping cough), poliomyelitis and other diseases that the department specifies by rule, and to protect against tetanus. ... These records shall be available to the individual or, if the individual is a minor, to his or her parent, guardian or legal custodian upon request. s. *252.04*
- “State epidemiologist” means the individual appointed by the state health officer under s. 250.02 (1) as the state epidemiologist for acute and communicable diseases. s. *252.01 (6)*
- “Local health officer” means the person designates as the local health officer for the place of residence of a case or suspected case of a communicable disease. s. *HFS 145.03 (17)*

## **Confidentiality of Alcohol and Drug Abuse Patient Records: Volume 42, Code of Federal Regulations, Part 2**

### Discussion

The federal regulations governing information related to the diagnosis and treatment for alcohol and drug abuse precede HIPAA by decades and provide stringent privacy protections. The broad definition of “receiving federal assistance” includes AODA programs that directly receive federal money for their programs as well as programs conducted by a state or local government unit receiving any federal assistance that could be used to fund AODA programs.

The regulations require **unconditional compliance** by programs to which they apply and state that disclosure may not be made for any civil or criminal proceeding in any court, unless a specific exception applies.

With respect to reporting of child abuse and neglect, a court order is required to obtain any information other than information revealed in the initial report of child abuse/neglect. The regulations strictly prohibit disclosure of AODA information for purposes of a criminal investigation or prosecution. However, s. 2.65 specifically permits a court order for disclosure for an investigation and prosecution of child abuse/neglect. To compel a records custodian to disclose, a subpoena must accompany the court order.

### Definitions

- “Records” mean any information, whether recorded or not, relating to a patient received or acquired by a federally assisted alcohol or drug program. *42 CFR s. 2.11*
- “Patient identifying information” means the name, address, Social Security Number (SSN), fingerprints, photograph, or similar information by which the identity of a patient can be determined with reasonable accuracy and speed. *42 CFR s. 2.11*

- “Disclosure” means communication of patient identifying information, the affirmative verification of another person’s communication of patient identifying information, or the communication of any information from the record of a patient who has been identified. Does not apply to communication within a program or between a program and an entity having direct administrative control over that program. *42 CFR s. 2.11 and s. 2.12(c)(3)*
- “Written consent” means the document that meets the requirements of the federal regulations and authorizes the disclosure of patient identifying information. *42 CFR s. 2.31*

## **Health Insurance Portability and Accountability Act (HIPAA); Volume 45, Code of Federal Regulations, Parts 160 and 164**

### Discussion

The HIPAA regulations apply to health care providers who perform one of eight identified electronic transactions. A health care provider who performs all business activities paper-based, rather than electronically, may be exempt from HIPAA. However, such a health care provider must adhere to Wisconsin privacy laws and other applicable federal laws.

The HIPAA Collaborative of Wisconsin has produced numerous documents for use by healthcare providers/organizations and others to facilitate implementation of HIPAA in Wisconsin. To view and print out the documents: go to [www.hipaacow.org/home](http://www.hipaacow.org/home); click in left column on Documents/Forms; Privacy Documents; click “agree” and then review the list of “deliverables” posted.

HIPAA regulations require all covered entities to meet two critical standards when requesting, using or disclosing health information:

- Need to Know: an individual requesting, using or disclosing information must need the health information to perform a specific job function.
- Minimum Necessary: an individual with a job-related need to know information to perform a job duty may access, use, or disclose only the minimum information necessary to accomplish the job function, unless covered by an exception to the standard under 45 C.F.R. s. 164.502 (b)(2).

The HIPAA definition of a health care provider below is broader than under s. 146.81, so HIPAA may apply to some records that Wisconsin law does not. See list of health care providers under Wisconsin law in Appendix 4.

HIPAA permits some disclosures, without authorization of the subject, for which Wisconsin law does not include an exception. Health care providers must adhere to Wisconsin law when it provides greater privacy protection to the subject.

### Definitions

- “Authorization” means the valid written document that meets the legal standards specified in the federal regulations and permits a covered entity to use or disclose protected health information. *45 C.F.R. s. 164.508(c)*
- “Covered entity” means a health plan, health care clearinghouse, or health care provider that transmits any health information in electronic form in connection with a transaction covered by this subchapter. *45 CFR s. 160.103*
- “Disclosure” means the release, transfer, provision of, access to, or divulging in any other manner of information outside of the entity holding the information. *45 CFR s. 160.103*

- “Health care provider” means a provider of service, a provider of medical or health services, and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business. *45 CFR s. 160.103*
- “Individually identifiable health information” is information that is a subset of health information, including demographic information collected from an individual, and:
  - Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
  - Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and that identifies the individual; or with respect to which there is a reasonable basis to believe the information can be used to identify the individual. *45 CFR s. 160.103*
- “Protected health information” means individually identifiable health information that is transmitted by or maintained in electronic media, or any other form or medium excluding individually identifiable health information in education records covered by FERPA, 34 CFR Part 99, and employment records held by a covered entity in its role as employer. (emphasis added) *45 CFR s. 160.103*
- “Treatment” means the provision, coordination, or management of health care and related services by one or more health care providers...” *45 CFR s. 164.502*
- “Use” means the sharing, employment, application, utilization, examination, or analysis of individually identifiable information within an entity that maintains such information. *45 CFR s. 160.103*

#### **S. 118.125, Pupil Records, Wisconsin Statutes**

Pupil/education records maintained by Wisconsin school districts and discussed in Chapter 7 of the Guide include two types of health information:

- Pupil physical health records as defined under s. 118.125 (1)(cm) governed by the Family Education Rights and Privacy Act (FERPA). [See Chapter 7]
- Patient health care records, health care information other than information under s. 118.125 (1)(cm), protected under ss. 146.81-146.84, s. 51.30 or s. 252.15. [Chapter 4]

### **SECTION 2: TABLE 4**

#### **PURPOSE OF TABLE 4**

Table 4 identifies “**to whom**” or “**for what purpose**” a health care provider may legally disclose health care information without obtaining a written authorization from the subject (patient) of the information, or a person authorized to consent on behalf of the subject. The table includes **all the exceptions** under s. 146.82, s. 51.30, s. 252.15, s. HFS 92.04, and 42 C.F.R. Part 2 and 45 C.F.R. Parts 160 and 164, **not just the exceptions pertaining to the reporting of child abuse/neglect**. Child welfare cases can be complex and involve disclosures beyond the initial reporting of abuse/neglect. Professionals dealing with health information under a variety of situations may find the information useful.

Rather than presenting the statutory exceptions in the order in which they appear in the laws, the table identifies legal exceptions by the type or category of disclosure. It offers guidance to answer the following question posed by a health care provider in possession of a certain type of health information.

**To whom or for what purpose may I disclose confidential health information without a written authorization?**

For example, an internist with information regarding a patient's cardiac disease wants to know if she can disclose the information during a consultation with a cardiologist without the patient's written authorization. She locates the row in the first column relating to "treatment" and then finds the columns pertaining to s. 146.82, the Wisconsin law that governs physical health information, and 45 CFR Part 164, HIPAA, the federal law applicable to protected health information. Both laws permit disclosure by a treatment provider to another treatment provider for the purpose of treatment. In addition, under the "payment" section, the provider may disclose information to the entity that covers the costs of health care services provided.

As indicated in the "reporting of abuse/neglect" section, the internist, under s. 146.82, may report the minimum health information necessary to fulfill her obligation under Wisconsin law if she suspects child abuse.

Persons seeking information who ask the following question can use Table 4:

**Is there a legal exception that permits me to obtain certain health information without an authorization?**

For example, a coroner can locate the "upon death" disclosure category in the first column and find out under each law what type of information can be disclosed. Under s. 146.82, health care providers can disclose the information necessary for the coroner to complete the death certificate. Under s. 252.15, a health care provider with the knowledge that the deceased person was HIV positive may disclose that information to the coroner. As another example, a guardian ad litem may obtain mental health information in connection with a proceeding under Ch. 48 as stated in the "non-criminal legal proceedings" category in the first column as you read the third column governing s. 51.30 information.

**USING TABLE 4**

Read the table as follows: a health care provider may legally disclose to the named entity or for the stated purpose protected health information about an individual without that person's written authorization. The categories of information included in Table 4 are as listed below:

- Reporting abuse/neglect
- Treatment
- Payment for treatment
- Health care operations
- Persons involved with patient
- Law enforcement/Department of Corrections
- Legal proceedings; general
- Legal proceedings; non-criminal
- Legal proceedings; criminal

- Public health and safety activities including required reporting of communicable disease ; oversight functions
- Upon death
- Research
- Advocacy organization
- Organ and tissue donation
- Specialized government functions
- Miscellaneous
- De-identified information
- Wavier of confidentiality privilege

*Table 4 can be printed as a stand-alone document by identifying **pages 39-51** on a printer. Print in landscape format.*

**TABLE 4: Permitted Disclosures of Health Information Without Authorization**  
**APPLICABLE LAW**

PURPOSE/ENTITY	S. 146.82	S. 51.30/S. HFS 92.04	CH. 252	42 C.F.R. PART 2	45 C.F.R. PART 164
<b>TO REPORT ABUSE/NEGLECT</b>	County department, law enforcement and DA for investigation and prosecution of suspected child abuse/neglect under s. 48.981(7); upon request or per own initiative. s. 146.82(2)(a)11.	County agency, DHFS, protective services agency and law enforcement for investigation and prosecution of suspected abuse/neglect of child under Ch. 48 or adult under Ch. 55. s. 51.30(4)(a)17.	No provision.	Appropriate authorities for state required reporting of child abuse and neglect, but not for use in civil/criminal proceedings without a court order. 42 CFR s. 2.12(c)(6)	Appropriate authorities, as required by state law, authorized to receive reports of abuse, neglect, or domestic violence. s. 164.512(b)(1)(ii) and (c)(1) [domestic violence reporting not required under Wis. law, so reporting not authorized without consent]
	County agency or other agency investigating suspected abuse/neglect of elderly/vulnerable adults under ss. 46.90 and 55.043. s. 146.82(2)(a)7.			Court order required to disclose patient communications and original AODA records. 42 CFR s. 2.63(a)(2).	
<b>FOR TREATMENT APPLY "NEED TO KNOW" STANDARD</b>	Health care provider or persons under supervision to perform duties related to providing treatment. ss. 146.82(2)(a)2.a., b., and c.	Treatment facility staff with the need to know to perform job duties. s. 51.30(4)(b)6. s. HFS 92.04	HIV test results: health provider who provides care to the subject. s. 252.15(5)(a)2.	Personnel within a program on a need to know basis. 42 C.F.R. s. 2.12(c)(3)	Health care provider for treatment. s. 164.502(a)(1)(ii) s.164.506(c)(1) & (2)

PURPOSE/ENTITY	S. 146.82	S. 51.30/S. HFS 92.04	CH. 252	42 C.F.R. PART 2	45 C.F.R. PART 164
FOR TREATMENT CONT'D	Health care provider or persons under supervision to manage records. s. 146.82(2)(a)2.d.	M.D. when life/health of individual is in danger information needed for treatment; minimum information for emergency. s. 51.30(4)(b)8. s. HFS 92.04(8)	HIV test results: person who prepares or stores records for health provider. s. 252.15(5)(a)3.	Medical personnel in medical emergency. 42 C.F.R. s.2.51(a)	
		Within DHFS to coordinate treatment for mental illness, developmental disabilities and AODA for persons committed to or under DHFS supervision. s. 51.30(4)(b)7. s. HFS 92.04(7)	HIV test results to health care provider at a prison/jail under s. 302.388. s. 252.15(5)(a)20.	FDA when a patient's health may be threatened by a medication taken/prescribed. 42 C.F.R. s. 2.51(b)	
		DHFS and county departments to measure progress of a patient, to assess least restrictive placement, etc. s. 51.30(4)(b)5.			
		Facility receiving person under a Chapter 48, 971 or 975 order; limited record set; not entire treatment record. s. 51.30(4)(b)9. s. HFS 92.04(9)(a)			



PURPOSE/ENTITY	S. 146.82	S. 51.30/S. HFS 92.04	CH. 252	42 C.F.R. PART 2	45 C.F.R. PART 164
FOR TREATMENT CONT'D		County department to coordinate services per written agreement approved by DHFS; limited information. s. 51.30(4)(b)15.	Sexually transmitted diseases as necessary for the preservation of public health, or for use in court commitment under s. 252.11(5), or under Ch. 938. s. 252.11		
FOR PAYMENT	Billing, collections and payment of claims. s. 146.82(2)(a)3.	DHFS and county departments for billing/collection purposes. s. 51.30(4)(b)2.	No provision.	No provision.	Payment activities. 45 C.F.R. s. 164.506(c)(3) & s. 164.502(a)(1)(ii)
FOR HEALTH CARE OPERATIONS	Health care operations as defined in 45 C.F.R. 164.501. s. 146.82(1)	Individual, agency/organization designated by DHFS to perform audits, program monitoring, and evaluation. s. 51.30(4)(b)1.	No provision.	Qualified personnel for management, financial audits and program evaluation with agreement that no identifying information will be included in any report. 42 C.F.R. s. 2.53	Audits, quality assessment, investigations, inspections, licensure or disciplinary actions, etc., for oversight of health care system/government benefit programs, civil rights compliance. 45 C.F.R. s. 164.501 & s. 164.506(c)(4)

PURPOSE/ENTITY	S. 146.82	S. 51.30/S. HFS 92.04	CH. 252	42 C.F.R. PART 2	45 C.F.R. PART 164
FOR HEALTH CARE OPERATIONS CONT'D		DHFS to coordinate treatment for mental illness, developmental disabilities and AODA; limited information to county department for coordination of services. s. 51.30 (4)(b)7.		Program to entity with administrative control. 42 C.F.R. s. 2.12(c)(3)	
TO PERSONS INVOLVED WITH OR IN CONTACT WITH PATIENT	Entities involved in placement of child outside of the home from recommendation through placement under Chapter 48 or 938. s. 146(2)(a)18m.	Spouse, parent, adult child/sibling directly providing care or monitoring treatment as verified under statute; only limited information. s. 51.30(4)(b)20.	Entities involved in the out-of-home placement of a minor under Chapters 48 and 938. s. 252.15(5)(a)19.	Acknowledge presence in facility known as AODA treatment facility with written consent of subject or court order. 42 C.F.R. s. 2.13(c)	Family member or friend involved with care or payment for care of subject unless subject objects. 45 C.F.R s. 164.510(b)(1)(i) [broader than WI law]
		Notice of presence or absence at an inpatient facility to parents, spouse, children, mental health professionals providing treatment and law enforcement. s. 51.30(4)(b)13.	Sexual contacts and those with whom a decedent shared intravenous drug paraphernalia by decedent's physician. s.252.15(5)(a)14..		Notification of subjects' location, condition, and/or death to persons involved in the care of the subject. 45 C.F.R. s. 164.510(b)(1)(ii) [broader than WI law]
		Person consenting for mental health care: Guardian under Ch. 880, parent of child under 14 years or subject unable to consent. s. 51.30 (4)(b)	Guardian under Ch. 880 who authorizes testing, parent of minor under 14 years of age, or individual for a person unable to give consent. s. 252.15(5)(a)15.		Limited information to disaster relief entities to coordinate relief efforts for notification purposes. 45 C.F.R. s. 164.510(b)(4) [no equivalent in WI law]

PURPOSE/ENTITY	S. 146.82	S. 51.30/S. HFS 92.04	CH. 252	42 C.F.R. PART 2	45 C.F.R. PART 164
TO PERSONS INVOLVED WITH OR IN CONTACT WITH PATIENT CONT'D			Health care agent under activated Power of Attorney for Health Care. s. 252.15(5)(a)1.		
			Alleged victim, victim, health care provider, and parent if victim under age 18. s. 252.15(5)(a)17.		
			Significantly exposed emergency caregiver or other performing a job duty. s. 252.15(5)(a)11.		
TO LAW ENFORCEMENT; DEPARTMENT OF CORRECTIONS (DOC)	Prisoner's health care provider, medical staff of prison/jail, intake staff at prison/jail or person maintaining medical records for disclosure of health information under s. 302.88. s. 146.82(2)(a)21.	Correctional officer with custody or supervision of person transferred or discharged from a treatment facility; change in status only. s. 51.30(4)(b)12.	Sheriff, jail or keeper of prison for proposes of assigning single cell. s. 252.15(5)(a)13.	Report a crime on premises of AODA program or against program personnel; facts of crime not AODA information. 42 C.F.R. s. 2.12(c)(5)	Upon request from law enforcement for identifying/locating a suspect, fugitive, material witness, or missing person; limited information. 45 C.F.R. s. 164.512(f)(2)

PURPOSE/ENTITY	S. 146.82	S. 51.30/S. HFS 92.04	CH. 252	42 C.F.R. PART 2	45 C.F.R. PART 164
TO LAW ENFORCEMENT; DEPARTMENT OF CORRECTIONS (DOC) CONT'D	See "Upon Death" section-	Correctional facility or DOC agent regarding individual receiving services under ch. 51; limited information. s. 51.30(4)(b)10.		Undercover agents/informants on premises to criminally investigate employees: court order needed. 42 C.F.R. S. 2.67	Law enforcement about a victim or suspected victim when patient unable to consent and information is not intended for use against the victim. 45 C.F.R. s. 164.512(f)(3) [No equivalent under WI law]
		Law enforcement, if authorized by DHFS Secretary, regarding persons under Chapters 971 or 975, or ss. 51.35 or 51.37; limited information. s. 51.30(4)(a)16.			Law enforcement when entity believes information is evidence of criminal conduct on premises of covered entity. 45 C.F.R. s. 164.512(f)(5) [No equivalent under WI law]
		Law enforcement to report apparent crime on premises of inpatient treatment facility/nursing home; limited information. s. 51.30(4)(b)19.			Law enforcement when provider of emergency health care believes a crime has been committed elsewhere. 45 C.F.R. s. 164.512(f)(6)
		DOC for purpose of registration with Sex Offender Registry Program under s. 301.45. s.51.30(4)(b)24			Law enforcement or correctional institution to provide health care to inmates, s. 164.512(k)(5) [Broader than WI law]

PURPOSE/ENTITY	S. 146.82	S. 51.30/S. HFS 92.04	CH. 252	42 C.F.R. PART 2	45 C.F.R. PART 164
TO LAW ENFORCEMENT; DEPARTMENT OF CORRECTIONS (DOC) CONT'D		DOC/sheriff to assess compliance with driver safety plan. s.51.30(4)(b)26.			Law enforcement to identify/apprehend individual; limited information. 45 CFR s.164.512(j)(1)(ii) [No equivalent under Wis. law]
					Upon death if suspicion that crime led to death. 45 CFR s. 164.512(f)(4) [No equivalent under Wis. law]
					When state law requires reporting of wounds and other injuries. 45 CFR s. 164.512(f)(1)(i)
PER COURT ORDER	Lawful order of a court of record. s. 146.82(2)(a)4.	Lawful order of a court of record. s. 51.30(4)(b)4.	Lawful order of a court of record. s. 252.15(5)(a)9.	Lawful order of a court of record. Court must adhere to specific standards before issuing order. Subpoena also required to compel disclosure. 42 C.F.R. s. 2.61	Judicial or administrative proceedings pursuant to court order, or subpoena or discovery request under some circumstances. 45 C.F.R. s. 164.512(e) [Wis. law requires court order. Subpoena or discovery request not sufficient]

PURPOSE/ENTITY	S. 146.82	S. 51.30/S. HFS 92.04	CH. 252	42 C.F.R. PART 2	45 C.F.R. PART 164
<b>FOR NON- CRIMINAL LEGAL PROCEEDINGS</b>	Any official entity involved in an out -of-home placement of child or juvenile under Chapters 48 or 938. s. 51.30(4)(b)10m s. 146.82(2)(a)18m.	Examiners/facilities for proceeding under s. 971.17 or Ch. 980 s. 51.30(4)(b)8m.	School, day care center or nursery school to DA re. student who fails to comply with immunization or waiver requirement within 60 days. s. 252.04(6)	See "Court Order" above.	See "Court Order" above.
	Persons under s. 655.17(7)(b) when patient files submission of controversy. s. 146.82 (2)(b)10.	Subject's attorney, GAL and counsel for proceedings under Chapters 48, 971 and 975. s. 51.30(4)(b)11.			
	Appropriate examiners and facilities in accordance with s. 971.17 or Ch. 980 . s. 146.82(2)(c)	GAL for unborn child for proceedings under s. 48.133. s. 51.30(4)(b)11m.			
	County agency, DHFS, or protective services agency under Ch. 55 and law enforcement for purposes of s. 55.04. s. 146.82	DOJ and DA for person who may be committed under Ch. 980. s. 51.30(4)(b)10m			

PURPOSE/ENTITY	S. 146.82	S. 51.30/S. HFS 92.04	CH. 252	42 C.F.R. PART 2	45 C.F.R. PART 164
FOR NON- CRIMINAL LEGAL PROCEEDINGS CONT'D		Mental health review officer for minors involved in proceedings under Chapters 48 or 938. s. 51.30(4)(b)21.			
FOR CRIMINAL PROCEEDINGS	Entities investigating or prosecuting sexual exploitation by a therapist. s. 146.82(2)(a)13.	See "Court Order" above	See "Court Order" above.	See "Court Order" above. 42 C.F.R. s.2.65 and 2.63 (a)(2)	See "Court Order" above.
				Petition to court to use informant information to prosecute AODA program. 42 C.F.R. s. 2.66.	
FOR PUBLIC HEALTH AND SAFETY ACTIVITIES; HEALTH OVERSIGHT	Named entities (health care providers) shall report information regarding a communicable disease to a local health officer or state epidemiologist per procedures under s. HFS 145.04 (1) through (3).	Duty to warn under case law.	HIV test results to state epidemiologist or designee. s. 252.15(5)6.	Audit and evaluation activities without copying or removal of records. 42 CFR s. 2.53	Person who may have been exposed to communicable disease and employer under certain circumstances. 45 CFR s. 164.512(b)(1)(iv) [No equivalent under WI law except limited circumstances under s. 252.15]
	Administrators of health care facilities, state correctional facilities or jails shall report sexually transmitted diseases to local health officer. s. HFS 145.15				

PURPOSE/ENTITY	S. 146.82	S. 51.30/S. HFS 92.04	CH. 252	42 C.F.R. PART 2	45 C.F.R. PART 164
FOR PUBLIC HEALTH AND SAFETY ACTIVITIES; HEALTH OVERSIGHT CONT'D	Request by federal/state governmental agency to perform legally authorized function [e.g., audits, program monitoring, certification and licensure]. s. 146.82(2)(a)5		Teachers, nurses and principals report communicable diseases to local health officer. s. 252.21.		Employer under limited circumstances per 29 CFR ss. 1904-1928 & 30 CFR ss. 50-90
	Health care facility staff committees or review organizations for audits, program monitoring and evaluations. s. 148.82(2)1.				Reporting of disease, injury, births/deaths, public health investigations and interventions. 45 C.F.R. s. 164.512(b)(1)(i)
	Physician and optometrist may report to DOT when physical or mental condition may interfere with ability to control vehicle. s. 146.82(3)(a) & (b)				FDA regarding adverse events, product defects, etc. 45 C.F.R. s. 164.512(b)(1)(iii)
	DHFS to report cancer under s. 255.04. s. 146.82(2)(b)8.				Oversight agency for audits; administrative, civil or criminal investigations; inspections; licensure/disciplinary actions; administrative, civil, criminal or proceedings. 45 C.F.R. s. 164.512(d)
	DHFS for inspection and investigation of rural medical center under s. 50.53. s. 146.82(2)(a)17.				To avert serious threat to health and safety. 45 CFR s. 164.512(j)(1)(i) {may not be permitted in Wis.]



PURPOSE/ENTITY	S. 146.82	S. 51.30/S. HFS 92.04	CH. 252	42 C.F.R. PART 2	45 C.F.R. PART 164
UPON DEATH	Coroner/medical examiner to complete medical certificate or investigate a death under Chapter 979. s. 146.82(2)(a)18.	DHFS, sheriff, police, or DA to investigate death reported under s. 51.64. s. 51.30(4)(b)23.	Coroner or medical examiner under certain conditions. s. 252.15(5)12.	No Provision.	Coroners/medical examiners to perform duties. 45 C.F.R. s. 164.512(g)(1) [Note: broader than WI. law]
	DHFS, law enforcement or DA to investigate certain deaths. s. 146.82(2)(a)15.		Funeral director or other person preparing body or performing autopsy. s.252.15(5)7.		Funeral directors 45 C.F.R. s. 164.512(g)(2) [Not permitted in Wis except for HIV positive test results].
FOR RESEARCH	Researcher upon meeting statutory standards. s. 146.82(2)(a)6.	Researcher upon meeting statutory standards. s. 51.30(4)(b)3.	Researcher who meets statutory standards. s. 252.15(5)10.	Researcher who meets federal standards. s. 42 CFR s 2.52(a)	Research upon meeting federal standards. 45 C.F.R. s. 164.512(i)
TO ADVOCACY AGENCY	Board on Aging and Long Term Care. s. 146.82(2)(a)14.	Board on Aging and Long Term Care. s. 51.30(4)(b)22.	No Provision.	No Provision.	No Provision.
	Protection and Advocacy agency s. 146.82(2)(a)9.	Protection and Advocacy agency. s. 51.30(4)18.			
	Long term care ombudsman for persons 60 yrs. and older living in long term facility. s. 146.82(2)(a)16.				
FOR ORGAN AND TISSUE DONATION	Organ procurement organization by a hospital under s. 157.06(5)(b)1. s. 146.82(2)(a)19.	No provision.	Entities involved in organ and tissue donation. s. 252.15 (2)(am)	No provision.	Organ, eye and tissue donation. 45 CFR s. 164.512 (h)

PURPOSE/ENTITY	S. 146.82	S. 51.30/S. HFS 92.04	CH. 252	42 C.F.R. PART 2	45 C.F.R. PART 164
<b>FOR SPECIALIZED GOVERNMENT FUNCTIONS</b>	No provision.	For entry into statewide child welfare information system under s. 46.03(7)(g) to assist in delivery of services under chapters 48/938. s. 51.30(4)(b)27.	No provision.	No provision.	Military activities, national security and other federal government purposes. 45 C.F.R. s. 164.512(k) [Consult legal counsel]
<b>MISCELLANEOUS</b>	School district when health care provider is employed by or an agent for school district that maintains health care records and access is required. s. 146.82(2)(a)12.	Anyone can receive information to assist in apprehension of escapee admitted or committed under Chapter 51, 971, 975 or 980. s. 51.30(4)(b)12m	Blood bank, blood center, or plasma center. s. 252.15(5)4.	Note: 42 C.F.R. Part 2 does not apply to records maintained by VA or Armed Forces. 42 C.F.R. s. 2.12(c)	Facility directory information to person contacting facility including name, location, condition in general terms, and religious affiliation unless subject objects. 45 C.F.R. s. 164.510(a).
		County department, DOC, DHFS and an organization providing services under chapters 48 & 938 may enter/retrieve information entered into automated child welfare information system under s. 46.03(7)(g). s. 51.30(4)(b)27.	Subject or health care agent under POAHC may disclose to anyone. s. 252.15(5)(a)		

PURPOSE/ENTITY	S. 146.82	S. 51.30/S. HFS 92.04	CH. 252	42 C.F.R. PART 2	45 C.F.R. PART 164
MISCELLANEOUS CONT'D		Access to <u>court records</u> permitted to subject of a petition under ch. 51, to attorneys involved in the proceeding, to others as authorized by subject, per court order, by court to Department of Justice regarding possession of a firearm, and to DOC regarding persons required to register as sex offender. s. 51.30(3)			
DE-IDENTIFIED INFORMATION	Information that does not permit identification of patient. s.146.82 (2)(a)20.	Information that does not permit identification of patient. s. 51.30(4)(b)25.	No provision.	No provision.	Permitted after meeting stringent standards. 45 C.F.R. s. 164.514(a) [Stringent standards must be met]
WAIVER OF PRIVILEGE SEE EXCERPTS BELOW	Exception to privilege under s. 905.04(4) s. 146.82(1)	Exception to privilege under s. 905.04(4) ss. 51.30(4)(a) and 51.30(6) wrong cites	Exception to privilege under s. 905.04(4). s. 252.15(5)9.		

## **SECTION 3: WAIVERS OF STATUTORY PRIVILEGES**

### **INTRODUCTION**

Wisconsin law waives the standard privileges between lawyers and clients, health care providers and patients, spouses, victims and sexual assault/domestic violence advocates, and individuals and clergy under certain circumstances. Excerpts, with some paraphrasing, from ss. 905.03, .04, .045, and .05, appear below. The **bold** provisions apply to child abuse/neglect cases.

### **TYPES OF PRIVILEGES**

#### **905.03 Lawyer-client privilege**

No provision is included for abuse or neglect of a child, but s. 48.981(2) states that an attorney may report suspected and/or threatened child abuse/neglect. [Chapter 4]

#### **905.04 Physician-patient, registered nurse-patient, chiropractor-patient, psychologist-patient, social worker-patient, marriage and family therapist-patient and professional counselor-patient privilege.**

"A communication or information is "confidential" if not intended to be disclosed to 3rd persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication or information or persons who are participating in the diagnosis and treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor, including the members of the patient's family." s. 905.04

Exceptions to privilege: s. 905.04 (4)

- Proceedings for hospitalization, guardianship, protective services or protective placement.
- Examination by order of judge.
- Condition or an element of claim or defense in a legal proceeding.
- Homicide trials. There is no privilege in trials for homicide when the disclosure relates directly to the facts or immediate circumstances of the homicide.
- **Abused or neglected child or abused unborn child.**
  - There is no privilege in situations where the examination of an abused or neglected child creates a reasonable ground for an opinion of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor that the abuse or neglect was other than accidentally caused or inflicted by another.
  - There is no privilege in situations where the examination of the expectant mother of an abused unborn child creates a reasonable ground for an opinion of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor that the physical injury inflicted on the unborn child was caused by the habitual lack of self-control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.

#### Exceptions to privilege: s. 905.04 (4) Continued

- Tests for intoxication under s. 340.01(1v)
- Paternity proceedings under ss. 767.45 to 767.53.
- Reporting wounds and burn injuries under s. 146.995.
- Providing services to court in juvenile matters under s. 48.78 and s. 938.78.

#### **905.045 Domestic violence or sexual assault advocate-victim privilege.**

"A communication or information is "confidential" if not intended to be disclosed to 3rd persons other than persons present to further the interest of the person receiving counseling, assistance, or support services, persons reasonably necessary for the transmission of the communication or information, and persons who are participating in providing counseling, assistance, or support services under the direction of an advocate, including family members of the person receiving counseling, assistance, or support services and members of any group of individuals with whom the person receives counseling, assistance, or support services." s. 905.045 (1)

#### Exceptions

The privilege does not apply to any **report concerning child abuse** that an advocate is required to make under s. 48.981. s. 905.045 (4) [emphasis added]

#### Relationship to S. 905.04

"If a communication or information that is privileged under sub. (2) is also a communication or information that is privileged under s. 905.04 (2), the provisions of s. 905.04 supersede this section with respect to that communication or information." s. 905.045 (5)

#### **905.05 Husband–wife privilege.**

"A person has a privilege to prevent the person's spouse or former spouse from testifying against the person as to any private communication by one to the other made during their marriage." s. 905.05(1)

#### Exceptions

"In proceedings in which one spouse or former spouse is charged with a **crime against the person or property** of the other or **of a child** of either, or with a crime against the person or property of a 3rd person committed in the course of committing a crime against the other." s 905.05 (3)(b) [emphasis added]

#### **905.06 Communications to members of the clergy.**

#### Exceptions.

"There is no privilege under this section concerning observations or information that a member of the clergy, as defined in s. 49.981 (1) (cx), is required to report as suspected or threatened child abuse under s. 48.981 (2)."

## CHAPTER 7

### PUPIL (EDUCATION) RECORDS

#### DISCUSSION

The federal Family Education Rights and Privacy Act (FERPA) protects the confidentiality of education records. Federal regulations contained in 34 C.F.R. Part 99 implement FERPA. They define two categories of records: directory information and education records. A “record” is any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm and microfiche under 34 C.F.R. s. 99.3.

Section 118.125, Pupil Records, Wis. Stats., includes the equivalent confidentiality provisions contained in 34 C.F.R. Part 99. The statute identifies several categories of educational records maintained by Wisconsin school districts. The definition of “record” includes information communicated verbally, unlike FERPA. Therefore, Wisconsin law provides broader privacy protection to the subject of the information than FERPA, and, therefore, supersedes FERPA.

#### DEFINITIONS

- “Behavioral records” include psychological tests, personality evaluations, achievement tests, records relating to a pupil’s behavior, physical health records except immunization and lead screening records, law enforcement records obtained under s. 48.396(1) or s. 938.396 (1) or (1m), and other records that are not progress records. s. 118.125(1)(a)
- “Directory data” includes name, address, telephone, date/place of birth, field of study, participation in activities/sports, dates of attendance, degrees, or awards. s. 118.125(1)(b)
- “Law enforcement agency information” includes information received by a school district or private school administrator from a law enforcement agency under s. 48.936 or s. 938.396. s. 118.127
- “Law enforcement unit records” include records created and maintained by a school law enforcement unit. s. 118.125(1)(bs) [Not part of Pupil Records]
- “Patient health care records” means any pupil record that relates to a pupil’s physical health, that is not a pupil physical health record under s. 118.125 (2m), shall be treated as a patient health care record under ss. 146.81 to 146.84, except for a record related to HIV tests results which shall be treated as provided under s. 252.15.
- “Privileged communications” includes information maintained by psychologists, counselors, social workers, nurses, teachers and administrators engaging in AODA program activities. s. 118.126
- “Progress records” include grades, courses, attendance, immunization and lead screening records and information about extracurricular activities. s. 118.125(1)(c)
- “Pupil physical health records” means those pupil records that include basic health information about a child, including the pupil’s immunization records, an emergency medical card; a log of first aid and medicine administered to the pupil. an athletic permit card, a record concerning the pupil’s ability to participate in an education program, any lead screening records under s. 254.162, results of any routine screening test, such as for hearing, vision or scoliosis, and follow-up to such tests, and any other basic health information as determined by the state superintendent. s. 118.125(1)(cm)

- “Pupil records” include all records relating to a pupil maintained by a school except notes for personal use by a licensed or certified professional, records available only to those involved in psychological treatment of a pupil, and law enforcement unit records. s. 118.125(1)(d)
- “Record” means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics.” s. 118.125 (1)(e)

#### **PUPIL AND PARENT/GUARDIAN ACCESS TO RECORDS**

- Progress records are available to a pupil or parent/guardian of minor pupil for reviewing and copying. s. 118.125(2)(a)
- Adult pupil or parent/guardian of a minor may access and copy behavioral records in presence of school official who can explain contents. s. 118.125 (2)(b)
- Parent denied physical placement by a court under s. 767.24(4), does not have the rights of a parent. s. 118.125 (2)(m)
- Adult pupil or parent/guardian of a minor pupil may access law enforcement unit records contained in pupil records under s. 938.396. s. 118.125 (7) See Chapter 7
- Staff designated as engaging in AODA program activities shall not disclose AODA information unless pupil aged 12 years or older signs an authorization. s. 118.126(1)(a)

#### **TABLE 5: AUTHORIZED DISCLOSURES OF PUPIL RECORDS**

The primary rows in the table (shaded with **bold** titles) describe the category of pupil information. The rows appearing under the primary rows list the permitted disclosures. The relevant statutory citation appears after each entry. *Appendix 5 provides a stand-alone version of Table 5 in a larger font.*

<b>PUPIL RECORDS</b>
<ul style="list-style-type: none"> <li>▪ To employees of school district with legitimate educational interests. s. 118.125(2)(d)</li> <li>▪ To a public officer any information required under Chapters 115-121. s. 118.125(2)(g)1.</li> <li>▪ To Department of Public Instruction (DPI) for audit/evaluation of federal or state program, or to assess compliance with chapters 115-121. s. 118.125(2)(g)2.</li> <li>▪ To comply with a court under Chapters 48 and 938 after attempt to notify parent/guardian s. 118.125(2)(L)</li> <li>▪ To appropriate authorities when necessary to protect health/safety of any person (emergency). s.118.125(2)(p)</li> <li>▪ To Multidisciplinary Team under Chapter 115. s.118.125(5)(a)</li> <li>▪ To parent/guardian of adult pupil who is dependent on parent/guardian when pupil has not objected. s.118.125(2)(k)</li> <li>▪ For the purpose of providing services before adjudication under Chapter 48 or 938 to law enforcement agency, district/city attorney, corporation counsel, agency under s. 938.78(1), intake worker, court of record, municipal court, private school, or another school board pursuant to an interagency agreement. s.118.125(2)(n)</li> <li>▪ To a court upon issuance of a subpoena to review in camera for purpose of impeaching a witness. s.118.125(2)(f)</li> </ul>
<b>PROGRESS RECORDS</b>
<ul style="list-style-type: none"> <li>▪ Upon request of a judge conducting a legal proceeding involving a pupil. s.118.125(2)(c).</li> </ul>

**Table 5 Continued**

<b>BEHAVIORAL RECORDS</b>	
<ul style="list-style-type: none"> <li>▪ Disclosure permitted as part of pupil record when disclosure of pupil record is authorized.</li> </ul>	
<b>DIRECTORY DATA</b>	
<ul style="list-style-type: none"> <li>▪ To any person with prior proper notice to the parent/guardian of the type of data included and parent/guardian has not objected to disclosure without prior consent. <i>s. 118.125(2)(j)1.</i></li> <li>▪ To technical college district (if parent/guardian has notice and has not objected) names of pupils expected to graduate from high school in current school year. <i>s. 118.125(2)(j)2.</i></li> <li>▪ To law enforcement agency, DA, city attorney, corporation counsel, county department, court of record, municipal court for purpose of enforcing pupil's school attendance, investigating alleged criminal/delinquent activity, or relating to health and safety with prior notice to parent or guardian and that person has not objected). <i>s. 118.125(2)(j)3.</i></li> <li>▪ Disclosure permitted as part of pupil record when disclosure of pupil record is authorized.</li> </ul>	
<b>PUPIL PHYSICAL HEALTH RECORDS</b>	
<ul style="list-style-type: none"> <li>▪ Health information not covered by s. 118.125(1)(cm) governed by ss. 146.81-84. <i>s. 118.125(2m)(a)</i></li> <li>▪ HIV results governed by s. 252.15. <i>s. 118.125(2m)(b)</i></li> </ul>	
<b>LAW ENFORCEMENT UNIT RECORDS</b>	
<ul style="list-style-type: none"> <li>▪ Disclosure as permitted by law enforcement agency standards under s. 938.396(1) to (1x) and (5). <i>s. 118.125(7)</i></li> </ul>	
<b>LAW ENFORCEMENT AGENCY INFORMATION</b>	
<ul style="list-style-type: none"> <li>▪ Limited to information under s. 938.396(1m): Investigation of possession of alcohol, controlled substance or dangerous weapon, or regarding pupil taken into custody for alleged violation of law.</li> <li>▪ To designated school district employees with legitimate educational interests, including safety, and to those who provide treatment programs. <i>s. 118.127(2)</i></li> </ul>	
<b>ATTENDANCE RECORDS</b>	
<ul style="list-style-type: none"> <li>▪ To law enforcement with written certification that pupil is being investigated for truancy or a criminal/delinquent act and will not further disclose. <i>s. 118.125(2)(cg)</i></li> <li>▪ To a fire investigator who certifies that the pupil is under investigation and the attendance record is needed and will not further disclose. <i>s. 118.125(2)(ch)</i></li> <li>▪ Names of dropouts in response to a court order issued under s. 118.163(2m)(b). <i>s. 118.125(2)(c)2.</i></li> <li>▪ To county department supervising a child under a Chapter 48 or 938 dispositional order. <i>s. 118.125(2)(cm)</i></li> <li>▪ Disclosure permitted as part of pupil record when disclosure of pupil record or directory data is authorized. <i>s. 118.125(1)(b) and (d)</i></li> </ul>	
<b>LEAD SCREENING RECORDS</b>	
<ul style="list-style-type: none"> <li>▪ To local and state official under ss. 254.11 to 254.178. <i>s. 118.125(2)(hm)</i></li> </ul>	



**Table 5 Continued**

<b>AODA INFORMATION</b> <b>(Confidential Communications—Information received from a pupil about self or other pupil regarding use of alcohol or drugs)</b>	
<ul style="list-style-type: none"> <li>▪ To report abuse and neglect as required under s. 48.981.</li> <li>▪ Social worker, teacher, counselor, psychologist or administrator who engages in AODA program activities shall not disclose information unless a serious risk to health, safety or life of any person exists and disclosure will alleviate the danger. <i>s. 118.126(1)(b)</i></li> <li>▪ Social worker, teacher, counselor, psychologist or administrator who engages in AODA program activities shall not disclose information unless required to report information under s. 48.981. <i>s. 118.126(1)(c)</i></li> </ul>	
<b>IMMUNIZATION RECORDS</b>	
<ul style="list-style-type: none"> <li>▪ To DHFS for purposes under s. 252.04. <i>s. 118.125(2)(hm)</i></li> </ul>	
<b>NAMES OF WITHDRAWN PUPILS; NAMES OF DROP-OUTS</b>	
<ul style="list-style-type: none"> <li>▪ To technical college district board, public assistance agency, DHFS, DWD or county department names of withdrawn pupils. <i>s. 118.125(2)(i)</i></li> <li>▪ To a court the names of dropouts in response to court order under s. 118.163(2m)(b). <i>s. 118.125(2)(c)2.</i></li> </ul>	
<b>PERSONALLY IDENTIFIABLE INFORMATION TO PARENTS OF ADULT PUPIL</b>	
<ul style="list-style-type: none"> <li>▪ To parent of adult pupil dependent on parent if adult pupil has not stated in writing that information may not be disclosed. <i>s. 118.125(2)(k)</i></li> </ul>	
<b>PUPIL HARM TO OTHERS</b>	
<p>If a pupil has seriously physically harmed another person within the past 12 months or exhibits a pattern of seriously physically harming others AND there is reasonable cause to believe a current risk exists, school district may provide to teachers and other school personnel the minimum amount of information necessary to meet the educational needs of the students and protect the safety of staff and students. <i>s. 118.128</i></p>	

<p align="center"><b>CHAPTER 8</b></p> <p align="center"><b>SOCIAL SERVICES (CH. 46) AND PUBLIC ASSISTANCE (CH. 49) INFORMATION</b></p>
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**CHAPTER 46, SOCIAL SERVICES**

**Purpose and Applicability**

Statutory provisions in Chapter 46, Social Services, authorize Department of Health and Family Services (DHFS) to provide programs and services to children and unborn children in need of protection and services, and to coordinate and integrate social welfare programs in order to provide effective aid to all those in need of services for dependency, mental illness, developmental disabilities and other types of social maladjustment. Examples of programs include services for Alzheimer's Disease, homeless persons, children and families, and elderly persons.

DHFS governs several county-level agencies:

- s. 46.21, Institutions and department of human services in populous counties. (Milwaukee County)
- s. 46.215 County department of social services in populous counties. (Milwaukee County)
- s. 46.22, County social services. (Counties with populations of less than 500,000)
- s. 46.23 County department of human services. (Counties with populations of less than 500,000)

### **Exchange of Information Without Authorization**

The language below describes the exchange of information permitted without authorization of the subject under s. 46.21 (2m)(c), s. 46.215 (1m), s. 46.22 (1)(dm) and s. 46.23 (3)(e). The later three also include information under 938.78 (2)(a).

“Notwithstanding ss. 46.2895 (9), 48.78 (2) (a), 49.45 (4), 49.83, 51.30, 51.45 (14) (a), 55.06 (17) (c), 146.82, 252.11 (7) and 253.07 (3) (c), any subunit of the county department of human services acting under this subsection may exchange confidential information about a client, without the informed consent of the client, with any other subunit of the same county department of human services, with a resource center, care management organization or family care district, or with any person providing services to the client under a purchase of services contract with the county department of human services or with a resource center, care management organization or family care district, if necessary to enable an employee or service provider to perform his or her duties, or to enable the county department of human services to coordinate the delivery of services to the client.” s. 46.21 (2m)(c)

### **Reporting Under s. 48.981**

Professionals who perform duties under Chapter 46 (social workers, public assistance workers, etc.) are required reporters under s. 48.981. See Chapter 4.

## **CHAPTER 49, PUBLIC ASSISTANCE**

### **Purpose and Applicability**

Chapter 49, Public Assistance, states that DHFS administers the use of relief block grants paid to counties, and programs such as Medical Assistance, Wisconsin Works, and Food Stamps.

### **Access to Records**

Individuals have access to agency records regarding themselves “except that the agency may withhold information obtained under a promise of confidentiality.” s. 49.81 (3)

### **Exchange of Information Without Authorization**

Information regarding applicants for and recipients of public assistance benefits shall be confidential except for the following:

- Auditing/accounting purposes, and as permitted under federal law to locate person/assets of person who fails to comply with federal tax laws. s. 49.81(2)

- Monthly reports by agency administering AFDC and Wisconsin Works that include name and amount paid shall be open to public inspection under specified circumstances. *s. 49.32(9)*
- County department may provide address of recipient of food stamps, AFDC, and Wisconsin Works to law enforcement under certain circumstances. *s. 49.32 (10)*
- Disclosure of information permitted regarding applicant/recipient of Title 19 benefits only permitted when connected with administration of program. *s. 49.45 (4)*
- County department, relief agency, or Wisconsin Works agency shall release recipient's address to a person's attorney who is a party to an action in which recipient is a party/witness, after following specified procedures. *s. 49.83 (10m)*

### **Reporting Under s. 48.981**

Professionals who perform duties under Chapter 49 (social workers, public assistance workers, etc.) are required reporters under s. 48.981. See Chapter 4.

## **CHAPTER 9 WRITTEN AUTHORIZATIONS**

### **CHAPTER SUMMARY**

#### **Section 1:** Health Information

- Describes the information that must be included in a written authorization for use and disclosure of health information under federal and Wisconsin laws.
- Provides guidance for reviewing an authorization for validity.
- Identifies who has the legal authority to access health information and authorize its disclosure to others in Table 6.

#### **Section 2:** Education Information

- Describes the information that must be included in a written authorization for disclosure.
- Identifies who has the legal authority to access education information and authorize its disclosure to others.

#### **Section 3:** Information under Chapters 48 and 938

- Describes who has access and the right to authorize disclosure of information maintained under ch. 48, Children's Code, and ch. 938, Juvenile Justice Code.

### **SECTION 1: HEALTH INFORMATION**

#### **DISCLOSURE**

Federal and Wisconsin confidentiality laws applicable to health information require a written authorization for certain uses and disclosures of information. The laws dictate the content of an authorization. The form must include certain elements; must meet specific standards. [See Chapter 6, Table 4] some uses and disclosures of health information do not require a written authorization.

A professional who requests an individual to sign an authorization for disclosure or who receives a signed authorization should carefully review that document to ensure that the form complies with the legal mandates that apply to the type of health information specified in the document. To properly evaluate the adequacy of an authorization form, one must be familiar with Wisconsin and federal laws: s. 146.82, s. 51.30, s. 252.15, 42 C.F.R. Part 2 and 45 C.F.R. Part 164.

## **ELEMENTS OF A VALID AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION**

Prior to disclosing health information, the holder of the information shall review a written authorization to verify that it includes the required information under Wisconsin and federal laws. Element number six in the subsection below applies only to HIPAA covered entities. Special requirements apply to certain types of health information as reflected below.

The HIPAA Collaborative of Wisconsin website includes a helpful document that describes the Wisconsin and federal requirements for a valid written authorization. *The following requirements for an authorization are included in Appendix 6 for printing as a stand-alone document.*

### **Basic Information Required in an Authorization for Disclosure of Health Information**

1. Health care provider authorized to make the written, electronic or verbal disclosure.
2. Name of patient whose information is being disclosed.
3. Authorized recipient of the information.
4. Description of protected health information (PHI) to be disclosed (specificity required).
5. Purpose of disclosure
6. Notice of rights of subject of records.
  - a. Right to copy of authorization.
  - b. Right to revoke authorization.
  - c. Statement of whether treatment/payment/eligibility is based on signing.
  - d. Risk of further disclosure if recipient not covered by Wis./federal privacy laws.
  - e. Statement of provider's use of information for marketing/fundraising.
7. Effective time period of the authorization, expiration date or event.
8. Signature of patient or other person authorized to sign on behalf of the patient.
9. If signed by an authorized representative, state relationship.
10. Date signed.

## **Additional Information for Certain Types of Health Information**

- If information relates to mental health, developmental disabilities or AODA, a statement must be included that patient has a right to inspect/copy disclosed information.
- If information being disclosed relates to HIV test results, statement must be included regarding entities to whom health provider can disclose without authorization.  
s. 252.15(5)(a)

## **RIGHT TO ACCESS AND TO AUTHORIZE DISCLOSURE OF HEALTH INFORMATION**

### **General Guidelines**

Generally, confidentiality laws provide that an adult subject of the information, or the parent/guardian of a minor (17 years and younger) who is the subject of the information, has the right to access and authorize the use and disclosure of the health information governed by the law. However, some privacy laws permit minors to access and authorize disclosure of information without the consent of a parent/guardian.

For example, Chapter 51 authorizes a minor aged 14 and over to access and authorize disclosure of information (mental health, developmental disabilities, and alcohol and drug abuse information) regarding himself or herself. The parent/guardian also has the authority to access and authorize disclosure of information under ch. 51 for a minor (17 years and younger). Chapter 252 provides that a minor 14 years and older has sole control over access to and disclosure of his or her HIV test results. [See Table 6 for specific statutory citations.]

Federal regulations contained in 42 C.F.R. Part 2, grant a minor the right to sole control over information relating to the diagnosis and treatment for alcohol and drug abuse at the age at which a state law permits a minor to request and obtain services without parental consent. Under Wisconsin law, s. 51.47, a minor aged 12 years and older may seek and receive treatment without parental consent. Therefore, a minor aged 12 years and older controls access to and authorization for disclosure of AODA information. [See Table 6 for specific statutory citations.]

### **Review of a Written Authorization for Validity: Cautions**

An authorization must identify the health information authorized for disclosure in specific terms. A request for an entire record must include a clear explanation of the need for the entire record.

Authorization Signed by a Guardian: A holder of information reviewing an authorization signed by a guardian of an individual found incompetent under Chapter 880, Guardianship, should exercise caution. Only a guardian of the person, or a guardian of the person and the estate (not a guardian of the estate only) has access and authority to disclose health information on behalf of the ward. Generally, the order issued by the court is quite broad, but it could be limited in a manner that prohibits even the guardian of the person from accessing health information or signing an authorization. Therefore, the holder of the information should ask the guardian to provide information about the content of the court order, i.e., Letters of Guardianship.

Authorization Signed by a Health Care Agent: The authority of a health care agent named in a Power of Attorney for Health Care (POAHC) begins upon the determination of the patient's mental incapacity, unless otherwise specifically provided in the POAHC document. The principal (patient) may revoke the POAHC after activation at anytime. The authority of the agent terminates with a revocation by the principal, unless a guardianship under Chapter 880 is being sought.

Authorization Signed by a Parent: If a family court has denied a parent of a minor the right to physical placement, or a court has terminated a parent's rights, she or he may not exercise the rights of a parent under the privacy laws.

**TABLE 6: INDIVIDUALS WITH RIGHT TO ACCESS AND AUTHORIZE DISCLOSURE OF HEALTH INFORMATION**

The table includes a column for each privacy law. The rows under each column describe who has the right to access and authorize disclosure of the type of information covered by the law. *Appendix 7 provides Table 6 as a stand-alone document in a larger font.*

S. 146.82	S. 51.30	S. 252.15	42 C.F.R. Part 2	45 CFR Part 164
<b>ADULT</b>				
Adult has right to access and authorize disclosure of own information.	Same as s 146.82.	Same as s 146.82.	Same as s 146.82.	Same as s 146.82.
<b>HEALTH CARE AGENT AND GUARDIAN OF THE PERSON</b>				
Health care agent under a valid activated Power of Attorney for Health Care or guardian of the person appointed by a court has authority to access and authorize disclosure of principal's or ward's information	Same as s. 146.82 NOTE: Neither guardian nor agent may place an individual in a mental health treatment facility. Ward or principal must provide informed consent or a court order under ch. 51 must be obtained.	Same as s. 146.82	Same as s. 146.82	Same as s. 146.82  NOTE: Regulations would permit others to act on behalf of adult subject not permitted under Wisconsin law.
<b>PARENT/GUARDIAN OF A MINOR</b>				
Parent/guardian of a minor under 18 years of age.	Parent/guardian of a minor under 18 years of age.  See box below regarding minor aged 14 years and older.	Parent/guardian for a minor under 14 years of age.	Parent/guardian for a minor under 12 years of age	Parent/guardian for a non-emancipated minor.

Table 6 Continued

S. 146.82	S. 51.30	S. 252.15	42 C.F.R. Part 2	45 CFR Part 164
<b>MINOR</b>				
Minors lack authority.	Minor aged 14 years and older. NOTE: Consent of parent/guardian not also required.	Minor 14 years of age or older controls access to and disclosure of information.	Minor 12 years of age or older controls access to and disclosure of information.	Silent regarding authority of a minor. Follow Wisconsin laws
<b>AUTHORIZED REPRESENTATIVES OF A DECEASED PERSON</b>				
<ul style="list-style-type: none"> <li>• Parent/guardian of a deceased minor.</li> <li>• Spouse or Personal Representative of a deceased adult. (A personal representative is an individual appointed by a court).</li> <li>• If no spouse survives a deceased adult, the following next of kin have <b>equal</b> authority to act on behalf of the deceased individual: adult children, parents, grandparents, and adult siblings and their spouses.</li> </ul>				

## **SECTION 2: EDUCATION INFORMATION**

### **ELEMENTS OF A VALID AUTHORIZATION FOR DISCLOSURE OF PUPIL/EDUCATION INFORMATION**

FERPA requires an authorization signed by the subject of education information, or a person authorized to act on behalf of the subject, prior to the disclosure of information, unless the disclosure falls under an exception under 34 C.F.R. Part 99 or s. 118.125 (2).

- Identify specific records to be disclosed
- Purpose of disclosure
- Recipient of records
- Right of subject to obtain copy of information to be disclosed
- Signed and dated

### **RIGHT TO ACCESS AND AUTHORIZE DISCLOSURE OF PUPIL/EDUCATION INFORMATION**

Ch. 118, General School Operations, restricts access to records and the authority to consent to disclosure to the parent/guardian of a minor. A parent who has been denied periods of physical placement or who has had his or her parental rights terminated by a court does not have the right to access his or her child's records under s. 118.125 (2)(m).

A student must be 18 years of age before she/he gains the right of access and authority to consent to disclosure of his or her records created when a minor. An adult pupil has access and the right to authorize disclosure of his or her records.

## **SECTION 3: INFORMATION UNDER CHAPTERS 48 AND 938**

### **RIGHT TO ACCESS AND AUTHORIZE DISCLOSURE**

Access to and authority to consent to disclosure of non-health confidential information under the Children's Code and Juvenile Justice Code are essentially the same. These statutes do not define the required elements of an authorization.

The following access and authority to disclose applies to agency, law enforcement, and court records governed by chapters 48 and 938:

- Parent, guardian, or legal custodian of a minor, or a minor aged 14 years or older may have access to agency, law enforcement agency, and court records. *s. 48.78 (2)(ag), s. 48.396 (1b), & s. 48.396 (2)(ag) and s. 938.78 (2)(ag) & s. 938.396 (1b)*
- Parent, guardian, or legal custodian of a minor, or a minor aged 14 years of age or over, may authorize disclosure of information to a person named in an authorization. *s. 48.78 (2)(am), s. 48.396 (1d), & s. 48.396 (2)(am) and s. 930.78 (2)(am) & s. 938.396 (1d)*
- Note that a parent denied physical placement by a court or whose parental rights have been terminated by a court does not have access to or the right to authorize disclosure of information.

Chapter 48 includes the additional provisions below:

- Parent, guardian, or legal custodian of an expectant minor, an expectant mother aged 14 years of age or older, or GAL for the unborn child may have access. *s. 48.78 (aj), s. 48.396 (1b), and s. 48.396 (2)(aj)*
- Parent, guardian, or legal custodian of an expectant minor, an expectant mother aged 14 years of age or older, or GAL for the unborn child may authorize disclosure to a person identified in a written authorization. *s. 48.78 (2)(ap), s. 48.396 (1d), and s. 48.396 (2)(ap)*

Under both chapters 48 and 938, the court may refuse to release records if the court determines that such release could result in imminent danger to a person.

## **CHAPTER 10 RECORDING DISCLOSURES OF CONFIDENTIAL INFORMATION**

### **CHAPTER SUMMARY**

#### **Section 1: Health Information**

- Describes the recording requirements under Wisconsin and federal laws when an entity discloses health information with and without an authorization.
- Table 7 includes information about disclosures requiring recording, disclosures not requiring recording, content of the recording or log, and access to the information.



## Section 2: Pupil Information

- Describes the recording requirements when an education agency or institution discloses information regarding a pupil.

## **SECTION 1: HEALTH INFORMATION**

### **DISCUSSION**

Some confidentiality laws require the holder of the information to record certain information regarding a disclosure of confidential information. The recording permits the subject of the disclosed information to track who has received her or his confidential information. Section 146.82 and s. 51.30 require the recording of disclosures of the health information made with and without authorization via a notation in the subject's record. HIPAA only requires the recording of select types of disclosures of health information. As noted previously, HIPAA regulations apply only to covered entities. See [www.hipaacow.org](http://www.hipaacow.org) for more information.

Entities disclosing health information in Wisconsin must record all disclosures to comply with Wisconsin law including notation of both the date and time of the disclosure. When HIPAA requires the recording of information, the disclosing entity must record more information in the separate log than in the notation in the record required by Wisconsin law including the address, if known, of recipient of information, and the purpose of the disclosure.

### **TABLE 7: RECORDING DISCLOSURES OF HEALTH INFORMATION**

The 1<sup>st</sup> column in the table below describes the recording requirements under Chapters 51 and 146. The 2nd column identifies requirements under HIPAA. The table includes three sections:

- Disclosures that require recording/logging
- Disclosures that do not have to be recorded/logging
- Contents of the required recording/logging

*Appendix 8 provides a stand-alone version of Table 7 in a larger font.*

CHAPTERS 51 AND 146	HIPAA
DISCLOSURES REQUIRING RECORDING	
s. 146.82(2)(d) and s. 51.30 (4)(e): require a notation in the patient record of disclosures/releases made <b>with or without authorization of patient</b> .  <b>NOTE:</b> Wisconsin law controls because it provides more privacy protection to the patient than HIPAA.  Notation requirement applies to health information maintained in any record including a school record.	Requires recording of the following disclosures made <b>without patient authorization</b> in a log: <ul style="list-style-type: none"><li>• Public health activities</li><li>• Mandatory reporting of abuse, neglect, or violence against any person</li><li>• Health oversight activities</li><li>• Judicial/administrative proceedings</li><li>• Law enforcement activities except relating to inmates</li><li>• About decedents as required by law</li><li>• Research purposes</li><li>• Specialized government functions</li><li>• Workers' Compensation</li></ul>

**Table 7 Continued**

DISCLOSURES NOT REQUIRING RECORDING	
<p>No exceptions identified.</p> <p><b>NOTE:</b> Wisconsin law controls because it provides more privacy protection to the patient than HIPAA.</p>	<p>Disclosures that do <b>NOT</b> require logging:</p> <ul style="list-style-type: none"> <li>• For treatment, payment, and healthcare operations</li> <li>• Disclosures made prior to a health care provider becoming a covered entity</li> <li>• To subject of information</li> <li>• To recipient named in signed authorization</li> <li>• For national security and intelligence purposes</li> <li>• To persons involved in care of patient</li> <li>• For notification purposes to family</li> <li>• To law enforcement and correctional institutions per state law</li> <li>• Facility directories (hospitals)</li> </ul>
CONTENTS OF NOTATION/LOG	
CHAPTERS 51 and 146	HIPAA
<p>Information to be recorded in patient record:</p> <ul style="list-style-type: none"> <li>• Name of recipient</li> <li>• Date and time of disclosure</li> <li>• Type of information disclosed</li> </ul> <p><b>NOTE:</b> Requirements of Wisconsin laws and HIPAA must be met.</p>	<p>Information for HIPAA log:</p> <ul style="list-style-type: none"> <li>• Name and address of recipient (if known)</li> <li>• Date of disclosure</li> <li>• Brief description of PHI</li> <li>• Purpose of disclosure or copy of authorization/request</li> <li>• Summary entry permitted for multiple disclosures to same party for the same purpose</li> </ul>
ACCESS TO RECORDING/LOG	
<p>Recording of disclosures is contained in the record itself so is accessible when the record is accessed.</p>	<p>Subject of record may request access to the log that must be retained for 6 years.</p>

## **SECTION 2: PUPIL INFORMATION**

### **DISCUSSION**

Federal regulations at 34 C.F.R. s. 99.32 (a) require that an educational agency or institution maintain a record of each request for access to and each disclosure of personally identifiable information from a student's record. The agency/institution must keep the record of the requests and disclosures for as long as the records are retained. When an agency/institution discloses information with the understanding that the recipient may further disclose the information, the expected recipients shall be included in the recording.

**TABLE 8: RECORDING DISCLOSURES OF PUPIL INFORMATION**

The table is broken into four sections:

- Disclosures that require recording in the student record
- Disclosures that need not be recorded
- Obligation of educational agency/institution to inform recipient of prohibition against re-disclosure
- Content of the recording

*Appendix 9 provides a stand-alone version of Table 8 in a larger font.*

REQUESTS/DISCLOSURES REQUIRING RECORDING
All requests/disclosures shall be noted <b>except</b> as described in the following section.
DISCLOSURES NOT REQUIRING RECORDING
34 C.F.R. s. 99.33(c) <ul style="list-style-type: none"><li>• To parents of dependent students under 34 C.F.R. 99.31 (a)(8)</li><li>• Pursuant to court orders, lawfully issued subpoenas or litigation under s. 99.31(a)(9)</li><li>• Disclosures of directory information under s. 99.31(a)(11)</li><li>• Disclosures to parents/student under s. 99.31 (a)(12)</li><li>• Disclosures with respect to disciplinary proceedings under s. 99.31 (a)(14)</li><li>• To parents under s. 99.31 (a)(15)</li></ul>
OBLIGATION TO INFORM RECIPIENT OF PROHIBITION OF RE-DISCLOSURE UNDER 34 C.F.R. S. 99.33
All recipients except for disclosures under s. 99.31(a) (9), (11) and (12) [see above]
CONTENTS OF RECORD OF REQUESTS/DISCLOSURES
<ul style="list-style-type: none"><li>• Party making the request or recipient of information</li><li>• Legitimate interests of requesting/receiving party</li><li>• Date access provided</li><li>• If information will be further disclosed by recipient under s 99.33 (b), names of additional recipients and their legitimate interests</li></ul>

## CHAPTER 11

### PENALTIES FOR VIOLATING RIGHT TO PRIVACY OF CONFIDENTIAL INFORMATION

#### CHAPTER SUMMARY

##### Section 1: Health Information

- Lists the civil and criminal penalties, and possible employee discipline, for violating privacy laws governing health care information under Wisconsin and federal laws in Table 9.

##### Section 2: Education/Pupil Information.

- Describes penalty under FERPA for violating privacy rights.

#### SECTION 1: HEALTH INFORMATION

##### DISCUSSION

Laws that protect confidential health information from disclosure without a valid authorization, legal exception, or court order include penalty provisions for violation of their mandates.

Penalties include fines, prison time and disciplinary actions against employees. Fines under Wisconsin health laws may be as high as \$1,000 per violation up to a maximum of \$100,000. The maximum prison sentence is 3 years and 6 months. Employee discipline includes termination from employment. Fines and prison sentences under federal laws may be up to \$250,000 and 10 years in prison.

Wisconsin county district attorneys prosecute violations of state privacy laws. The U.S. Attorney in the federal district where the violation occurred prosecutes violations of 42 C.F.R. Part 2. The federal Office of Civil Rights investigates complaints alleging violations of HIPAA filed with the U.S. Department of Health and Human Services. Individuals may sue in civil courts under Wisconsin laws.

##### TABLE 9: PENALTIES FOR VIOLATING PRIVACY LAWS GOVERNING HEALTH INFORMATION

The table includes a section for each of the following laws: s. 146.84, s. 51.30, and 42 C.F.R. Part 2, 45 C.F.R. Part 164. Some laws contain civil penalties, criminal penalties and employee discipline as methods of enforcing the confidentiality provisions.

*Appendix 10 provides a stand-alone version of Table 9 in a larger font.*

#### PATIENT HEALTH CARE RECORDS

##### **Civil Penalties.** s. 146.84 (1)

Actions for violations; damages; injunction:

- Custodian of records incurs no liability for release when acting in good faith.
- Violator who acted in a knowing and willful manner liable for actual damages to person and up to \$25,000 in exemplary damages for each violation, plus cost and attorney fees.
- Violator who negligently violates confidentiality liable for actual damages to a person and up to \$1,000 in exemplary damages for each violation, and costs and attorney fees
- A person may bring an action to enjoin any violation or to compel compliance as well as seek damages as stated above.

**Table 9 Continued**

<p><b>Criminal Penalties.</b> <i>s. 146.94 (2)</i></p> <ul style="list-style-type: none"> <li>▪ Whoever does any of the following may be fined not more than \$25,000 or imprisoned for not more than 9 months or both: <ul style="list-style-type: none"> <li>✓ Requests/obtains confidential information under false pretenses</li> <li>✓ Discloses confidential information with knowledge that the disclosure is unlawful and is not reasonably necessary to protect another from harm.</li> <li>✓ Violates s. 146.83(4)</li> </ul> </li> <li>▪ Whoever negligently discloses confidential information is subject to a forfeiture of not more than \$1,000 per violation.</li> <li>▪ Whoever intentionally discloses confidentially informant under this chapter, knowing that the information is confidential, and discloses the information for pecuniary gain may be fined not more than \$100,000 or imprisoned not more than 3 years and 6 months, or both.</li> </ul>
<p><b>MENTAL HEALTH, DEVELOPMENTAL DISABILITIES, AND AODA INFORMATION</b></p>
<p><b>Civil Penalties.</b> <i>s. 51.30 (9)</i></p> <p>Actions for violations; damages; injunction</p> <ul style="list-style-type: none"> <li>▪ Violator liable for actual damages to a person and up to \$1,000 in exemplary damages for each violation, and costs and attorney fees.</li> <li>▪ No liability to custodian of records when acting in good faith.</li> <li>▪ Violator who acted in a knowing and willful manner liable for actual damages to person and up to \$25,000 in exemplary damages for each violation, plus costs and attorney fees. Actual damages to plaintiff are not a pre-requisite.</li> <li>▪ A person may bring an action to enjoin any violation or to compel compliance as well as seek damages as stated above.</li> </ul>
<p><b>Criminal Penalties.</b> <i>s. 51.30 (10)</i></p> <ul style="list-style-type: none"> <li>▪ Whoever does any of the following may be fined not more than \$25,000 or imprisoned for not more than 9 months or both: <ul style="list-style-type: none"> <li>✓ Requests/obtains confidential information under false pretenses</li> <li>✓ Discloses confidential information with knowledge that the disclosure is unlawful and is not reasonably necessary to protect another from harm.</li> <li>✓ Violates s. 51.30(4)(dm)1, 2. or 3., or s. 146.83(4)</li> </ul> </li> <li>▪ Whoever negligently discloses confidential information is subject to a forfeiture of not more than \$1,000 per violation.</li> <li>▪ Whoever intentionally discloses confidential information under this Chapter, knowing that the information is confidential, and discloses the information for pecuniary gain may be fined not more than \$100,000 or imprisoned not more than 3 years and 6 months, or both.</li> </ul>
<p><b>Employee Discipline.</b> <i>s. 51.30 (11)</i></p> <p>Any employee of DHFS, county department or public treatment facility who violates this Chapter or any rule promulgated pursuant to this Chapter may be subject to discharge or suspension without pay.</p>
<p><b>HIV TEST RESULTS</b></p>
<p><b>Civil Liability.</b> <i>s. 252.15(8)</i></p> <p>Any person who violates statute is liable to subject of the test for actual damages, costs, attorney fees, and exemplary damages up to \$1,000 for a negligent violation and up to \$25,000 for an intentional violation.</p>

**Table 9 Continued**

<b>ALCOHOL AND DRUG ABUSE PATIENT RECORDS.</b>
<p>Criminal penalty for violation. <i>42 C.F.R. Part 2, s. 2.4</i></p> <p>Any person who violates any provision shall be fined not more than \$500 for a first offense and not more than \$5,000 for each subsequent offense.</p>
<b>HIPAA</b>
<p><b>Civil Penalties.</b> <i>s. 1176, Public Law 104-191</i></p> <p>\$100 per violation per person up to a maximum of \$25,000 per person per year per standard violated</p>
<p><b>Criminal Penalties.</b> <i>s. 1177, Public Law 104-191</i></p> <ul style="list-style-type: none"> <li>▪ A person who knowingly and in violation of the law does one of the following: <ul style="list-style-type: none"> <li>✓ Uses/causes to be used a unique health identifier</li> <li>✓ Obtains individually identifiable health information relating to an individual</li> <li>✓ Discloses individually identifiable health information to another person</li> </ul> </li> <li>▪ Shall: <ul style="list-style-type: none"> <li>✓ Be fined not more than \$50,000, sentenced to 1 year in prison, or both;</li> <li>✓ If the offense is committed under false pretenses, be fined not more than \$100,000, sentenced to no more than 5 years in prison, or both; and</li> <li>✓ If the offense is committed to use the individually identifiable health information for commercial advantage, personal gain or malicious harm, be fined not more than \$250,000, sentenced to not more than 10 years in prison, or both.</li> </ul> </li> </ul>

## **SECTION 2: EDUCATION INFORMATION**

### **VIOLATIONS OF PRIVACY LAWS GOVERNING PUPIL/EDUCATION INFORMATION**

FERPA, protecting privacy of education records, also contains enforcement mechanisms for violation of the subject's rights.

<b>EDUCATION RECORDS, 34 C.F.R. PART 99</b>
<p>If the Secretary of U.S. Department of Education finds that an educational agency or institution has not complied with an order to takes steps to comply with the law, the Secretary may withhold further payments for a particular program, issue a cease and desist order, or terminate eligibility to receive funding under any applicable program. 34 C.F.R. 99.67.</p>

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## APPENDIX 1

**TABLE 1: CHAPTER 4 - MANDATED REPORTERS AND LAWS GOVERNING THEIR RECORDS**

MANDATED REPORTERS	LAWS GOVERNING RECORDS
<ul style="list-style-type: none"> <li>▪ Physician</li> <li>▪ Nurse</li> <li>▪ Dentist</li> <li>▪ Chiropractor</li> <li>▪ Optometrist</li> <li>▪ Acupuncturist</li> <li>▪ Medical professional not otherwise specified</li> <li>▪ Physical therapist and assistant</li> <li>▪ Occupational therapist</li> <li>▪ Dietitian</li> <li>▪ Speech-language pathologist</li> <li>▪ Audiologist</li> </ul> <p>ss. 48.981(2)(a)1., 4., 5., 6., 7., 8., 9. 22, .22m., 23., 24., 25. &amp; .26.</p>	<ul style="list-style-type: none"> <li>▪ s. 146.82 governs confidentiality of health care records.</li> <li>▪ 45 C.F.R. Part 164 governs confidentiality of protected health information.</li> <li>▪ s. 146.82 (2)(a)11. and 45 C.F.R. 164.512(c) state an exception that authorizes reporting of child abuse/neglect without authorization of the subject.</li> </ul>
<p>Professionals who provide treatment for mental illness, developmental disabilities and alcohol and drug abuse including:</p> <ul style="list-style-type: none"> <li>▪ Social worker</li> <li>▪ Marriage and family therapist</li> <li>▪ Professional counselor</li> <li>▪ Alcohol/drug abuse counselor</li> <li>▪ Mental health professional not otherwise specified in s. 48.981(2)</li> </ul> <p>ss. 48.981(2)(a)10., 11. &amp; 12.</p>	<ul style="list-style-type: none"> <li>▪ s. 51.30(4) governs the confidentiality of records relating to mental health, developmental disabilities and alcohol/drug abuse.</li> <li>▪ 42 C.F.R. Part 2 governs information relating to alcohol and drug abuse</li> <li>▪ s. 51.30 (4)(b)17. and 42 C.F.R. s. 2.12(c)(6) state an exception that authorizes reporting of child abuse and neglect without written authorization by subject.</li> </ul> <p>NOTE: Professionals listed in 1<sup>st</sup> column must report even if their information/records may not be covered under s. 51.30 or 42 C.F.R Part 2</p>
<ul style="list-style-type: none"> <li>▪ Coroner</li> <li>▪ medical examiner</li> </ul> <p>ss. 48.981(2)(a)2. &amp; 3.</p>	<ul style="list-style-type: none"> <li>▪ s. 146.82 governs records prepared by physicians</li> <li>▪ s. 146.82 (2)(a)11. authorizes reporting of child abuse and neglect without consent of the subject of the information.</li> </ul>

**Appendix 1: Table 1 Continued**

MANDATED REPORTERS	LAWS GOVERNING RECORDS
<ul style="list-style-type: none"> <li>Emergency medical technician</li> <li>First responder</li> </ul> <p>ss. 48.981(2)(a)27. and 28</p>	<ul style="list-style-type: none"> <li>s. 146.50(12) includes EMTs/1st responders as health care providers for ensuring confidentiality of health information under s. 146.82.</li> <li>s. 146.82(2)(a)11. and 45 C.F.R. s. 164.512(c) authorize reporting of child abuse and neglect without authorization of the subject of the information.</li> </ul>
<ul style="list-style-type: none"> <li>Police/law enforcement officer</li> </ul> <p>s. 48.981(2)(a)29.</p>	<ul style="list-style-type: none"> <li>s. 938.396 and s. 48.396 govern law enforcement records relating to juveniles and children</li> <li>Statutes above do not include a specific exception that authorizes reporting of child abuse/neglect, but <u>s. 48.981 requires reporting.</u></li> </ul>
<ul style="list-style-type: none"> <li>Education professionals</li> <li>School teacher</li> <li>School administrator</li> <li>School counselor</li> </ul> <p>s. 48.981(2)(a)14., 15 &amp; 16.</p>	<ul style="list-style-type: none"> <li>s. 118.125 and 34 CFR Part 99 (FERPA) govern confidentiality of educational records.</li> <li>34 CFR s. 99.36 includes an exception to the authorization requirement for disclosures necessary to protect the health or safety of a student or others. [NOTE: This exception covers abuse/neglect reporting]</li> <li>s. 48.981 requires reporting in Wisconsin; does not authorize disclosure of pupil records</li> </ul>
<ul style="list-style-type: none"> <li>Child-care worker in a day care center</li> <li>Day care provider</li> <li>Residential care center worker</li> </ul> <p>s. 48.981(2)(a)18. and 19.</p>	<ul style="list-style-type: none"> <li>s. 48.78 governs records of a licensed child welfare agency or day care center</li> <li>Statute above does not include an exception for reporting of child abuse/neglect, but <u>s. 48.981 requires reporting</u></li> </ul>
<ul style="list-style-type: none"> <li>Treatment staff employed by or under contract with a county department under s. 46.23, 51.42 or 51.437</li> <li>Residential care center for children/youth.</li> </ul> <p>s. 48.981(2)(a)21.</p>	<ul style="list-style-type: none"> <li>s. 146.82 or s. 51.30(4) govern records depending on type of information being disclosed.</li> <li>s. 146.82(2)(a)11. and s. 51.30(4)(b)17. authorize reporting of child abuse and neglect.</li> </ul>



## Appendix 1: Table 1 Continued

<ul style="list-style-type: none"> <li>▪ Court appointed special advocate. s. 48.981(2)(b)</li> </ul>	<ul style="list-style-type: none"> <li>▪ s. 48.236(4)(a) governs confidentiality of all information gathered by advocate.</li> <li>▪ Statute does not include an exception that authorizes reporting of child abuse and neglect, but <u>s. 48.981 requires reporting</u></li> </ul>
<ul style="list-style-type: none"> <li>▪ Mediator in family court matter. s. 48.981(2)(a)17.</li> </ul>	<ul style="list-style-type: none"> <li>▪ s. 767.11 describes duties of a mediator.</li> <li>▪ Statute does not include an exception that authorizes reporting of child abuse and neglect, but <u>s. 48.981 requires reporting</u></li> </ul>
<ul style="list-style-type: none"> <li>▪ Public assistance worker including a financial and employment planner s. 48.981(2)(a)13</li> </ul>	<ul style="list-style-type: none"> <li>▪ Chapter 49 governs records created and maintained by a public assistance worker</li> <li>▪ S. 48.981 requires the worker to report</li> </ul>
<ul style="list-style-type: none"> <li>▪ Clergy s. 48.981(2)(bm) [under limited circumstances]</li> </ul>	<p>Policies of religious organization.</p>
<b>VOLUNTARY REPORTERS</b>	
<p><b>Any person may report</b> abuse/neglect or suspected abuse/neglect of a child or unborn child, including an attorney. s. 48.981(2)(c)</p>	
<b>EXCEPTION TO REPORTING REQUIREMENT</b>	
<p>If providing minors with family planning services, pregnancy testing, obstetrical care and diagnosis/treatment for sexually transmitted disease, physicians, physician's assistants and nurses certified/registered under Ch. 441 or Ch. 448 and others obtaining information about minors receiving those health care services do <b>NOT</b> have to report, <u>except</u> as described below. s. 48.981(2m)(c)</p> <p>The above-described persons under s. 48.981 (2m)(c) must report under the following circumstances. s. 48.981(2m)(d) and (e)</p> <ol style="list-style-type: none"> <li>7. Sexual intercourse or sexual contact occurred or is likely to occur with a caregiver.</li> <li>8. Child suffered or suffers from a mental illness/mental deficiency that rendered or renders the child temporarily or permanently incapable of understanding or evaluating the consequences of his or her actions.</li> <li>9. Because of his or her age or immaturity, child was or is incapable of understanding the nature or consequences of sexual intercourse or sexual contact.</li> <li>10. Child was unconscious at the time of the act or for any other reason was physically unable to communicate unwillingness to engage in sexual intercourse or sexual contact.</li> <li>11. Another participant in the sexual contact or sexual intercourse was or is exploiting the child.</li> <li>12. Any reasonable doubt as to the voluntaries of the child's participation.</li> </ol>	

## APPENDIX 2

**TABLE 2: CHAPTER 4 - DISCLOSURE OF INFORMATION IN REPORTS, NOTICES AND RECORDS UNDER S. 48.981**

<b>TO SUBJECT, REPORTER AND PARENT</b>	
*Agency to subject of the report without identifying the reporter. s. 48.981(7)(a)1.	
*Agency to parent, guardian, legal custodian, foster parent, treatment foster parent or other person with physical custody of the child, or expectant mother or person with custody of expectant mother without identification of reporter. s. 48.981(7)(a)3m. and 4.	
*Agency to reporter, who is a relative, upon written request, information only regarding what action, if any, was taken (unless prohibited by a court order) and without identification of reporter. s. 48.981(7)(a)1m.	
*Either parent may authorize disclosure for use in child custody/adoption proceeding without identification of reporter. s. 48.981(7)(b)	
*Subject of report may authorize disclosure to subject's attorney without identifying reporter. s. 48.981(7)(c)	
<b>TO LAW ENFORCEMENT/COURTS/ATTORNEYS</b>	
Agency to law enforcement and District Attorney for investigation/prosecution. s. 48.981(7)(a)8.	
For proceedings under s. 48.25(6), CHIPS, and s. 813.122, Temporary Restraining Order, or 813.125, injunction. s. 48.981(7)(cm)	
Court or administrative agency for licensing or regulation of a facility under this chapter. s. 48.981(7)(a)9.	
Grand jury when needed to perform duties. s. 48.981(7)(a)14.	
Judge under s. 968.26. s. 48.981(7)(a)14m	
Court conducting certain proceedings under ch. 48 and 938 and county corporation counsel/DA, agency legal counsel or Guardian ad litem. ss. 48.981(7)(a)10., 10g., 10j., and 11.	
<b>TO SOCIAL/HUMAN SERVICES, COURT, MEDICAL AND OTHER PROFESSIONALS</b>	
Tribal court or other adjudicative body authorized by a tribe/band for certain proceedings, an attorney representing interests of an Indian tribe/band, and an attorney representing the child or unborn child in such proceedings. ss. 48.981(7)(a)10m., 10r. and 11m.	
Appropriate staff of an agency/tribal social services department. s. 48.981(7)(a)2.	
DOC, DHFS, county department or other person under contract who has custody/supervision over a child in a community placement. s. 48.981(7)(a)8m.	

**Appendix 2: Table 2 Continued**

DHFS any report or record maintained by an agency under s. 48.981. s. 48.981(7)(d)
Person authorized to provide intake/dispositional services under s. 48.067, 48.069, 48.10, 938.067, 938.069 or 938.10. ss. 48.981(7)(a)2m. and 2r.
Professional under s. 51.42 or s. 51.437 working with the child or expectant mother. s. 48.981(7)(a)5.
Attending physician for diagnosis/treatment. s. 48.981(7)(a)3.
Coroner, medical examiner, pathologist or other physician to investigate cause of death of child when unexplained/unusual. s. 48.981(7)(a)15m.
Federal or state agency of any state or local governmental unit when needed to carry out responsibilities relating to protection of a child/unborn child from abuse/neglect. s. 48.981(7)(a)17.
<b>TO AUTHORIZED ADVOCATES AND TEAMS</b>
Volunteer court appointed special advocate to perform advocacy services. s. 48.981(7)(a)11r.
Child advocacy center. s. 48.981(7)(a)6m.
Multidisciplinary child abuse/neglect or unborn child abuse team. s. 48.981(7)(a)6.
Child fatality review team, citizen review panel. ss. 48.981(7)(a)15. and 15g.
<b>MISCELLANEOUS</b>
Researcher with proper authorization from DHFS, except that the reporter cannot be identified. s. 48.981(7)(a)12.
General public, under specified conditions, certain information when a child has died or been placed in serious/critical condition. s. 48.981(7)(cr)

### APPENDIX 3

**TABLE 3: CHAPTER 5 - PERMITTED DISCLOSURES UNDER CHAPTER 48 AND 938 WITHOUT AUTHORIZATION**

<b>AGENCY RECORDS</b>	
<b>S. 48.78</b>	<b>S. 938.78</b>
Exchange of information permitted between an agency and another social welfare agency, law enforcement agency and public/private school regarding an individual in the care or legal custody of the agency, but each recipient must maintain confidentiality. s. 48.78(2)(b) [Note: "social welfare agency" is not defined.]	Exchange of information permitted with an agency, social welfare agency, law enforcement agency, victim-witness coordinator, fire investigator, public school district or private school regarding an individual in the care or legal custody of the agency, but each recipient must maintain confidentiality. s. 938.78(2)(b) [Note: broader provision than under s. 48.78(2)(b)]
Use of media to recruit adoptive parents by DHFS or county department. s. 48.78(2)(c)	Interagency agreement may be entered with agency, school board, private school, law enforcement agency and another social welfare agency for <b>routine</b> disclosure of information. s. 938.78(2)(b)1m. [Note: same provision <b>not</b> included in s. 48.78.]
Upon request by Department of Regulation and Licensing or other examining board for proceeding regarding alleged misconduct by a licensed or credentialed person. s. 48.78(2)(g)	s. 938.78(2)(g): same as s. 48.78 (2)(g)
DHFS or county department to Department of Corrections about individual under pre-sentence investigation, sentenced to prison, or on probation or parole. s. 48.78(2)(d)	s. 938.8(2)(d): same as s. 48.78(2)(d)
<b>LAW ENFORCEMENT OFFICERS' RECORDS</b>	
<b>S. 48.396</b>	<b>S. 938.396</b>
Court order. s. 48.396 (1)	s. 938.396 (1): same as s. 48.396 (1)
News media to report without revealing identity. s. 48.396 (1)	s. 938.396 (1): same as s. 48.396 (1)
Between police and child's school of attendance. s. 48.396 (1)	s. 938.396 (1): same as s. 48.396 (1)
Other law enforcement agencies. s. 48.396 (1)	s. 938.396 (1): same as s. 48.396 (1)

**Appendix 3: Table 3 Continued - Law Enforcement Officers' Records**

<b>S. 48.396</b>	<b>S. 938.396</b>
Social welfare agencies. s. 48.396 (1)	s. 938.396 (1): same as s. 48.396 (1)
Child aged 10 or over who is subject of criminal proceedings. s. 48.396 (1)	s. 938.396 (1): same as s. 48.396 (1)
Per request of the pupil aged 14 years or older, parent/guardian/legal custodian of pupil, or of a child expectant mother, or of the GAL for an unborn child per agency policy. s. 48.396(1b)	Per request of pupil 14 years and older or parent/guardian/legal custodian per agency policy. s. 938.396 (1b)
Per written authorization of the child aged 14 years or older, the parent/guardian/legal custodian of the child, or the GAL for an unborn child to a named person per agency policy. s. 48.396 (1d)	Per written authorization of a juvenile 14 years and older, or the parent/guardian/legal custodian of juvenile to a named person per agency policy. s. 938.396 (1d)
<u>Denial of access:</u> Person denied access to law enforcement records under s. 48.396 (1), (1b) or (1d) may petition court to order disclosure. s. 48.396(5)	Law enforcement agency may enter into interagency agreement with a school board, private school, other law enforcement agency and a social welfare agency for routine disclosures. s. 938.396 (1p)
	To Department of Justice, DA, judge and legal counsel for subject in a Ch. 980 commitment proceeding. s. 938.8(2)(e)
	On own or per request of school administrator agency may disclose information regarding a student's use/distribution/possession of alcohol or controlled substances, possession of a dangerous weapon, taking into custody under s. 938.19 and delinquency adjudication. s. 938.396 (1m)(a),(1m)(am),(1m)(ar) and (1m)(b)
	Law enforcement or fire investigator may petition the court to order school to permit review of pupil records under s. 118.125. s. 938.396 (1m)(c) and (1m)(d)
	Upon request of fire investigator. s. 938.396 (1x)
	Agency may petition to court for order to review pupil record under s. 118.125(1)(d) for purpose of providing treatment/care. s. 938.78(2)(b)2.

**Appendix 3: Table 3 Continued - Law Enforcement Officers' Records**

<b>S. 48.396</b>	<b>S. 938.396</b>
	Upon request of a victim may disclose limited information relating to injury/loss. s. 938.396 (1r)
	Request of victim-witness coordinator for enforcing victim rights and providing services. s. 938.396 (1g)
	Request of victim's insurer if juvenile fails to pay restitution within one year after entry of order. s. 938.396 (1t)
	<u>Denial of access</u> : Person denied access to law enforcement records under s. 938.396 (1), (1b), (1d), (1g), (1m), (1r) or (1t) may petition court to order disclosure. s. 938.396 (5)
<b>COURT RECORDS</b>	
<b>S. 48.396 (2)</b>	<b>S. 938.396 (2) (a)</b>
Court order. s. 48.396(2)(a)	s. 938.396 (2)(a) same as 1 <sup>st</sup> column
Per request of parent/guardian/legal custodian of juvenile, or juvenile 14 years and older to review court records. s. 48.396 (2)(ag)	s. 938.396 (2)(ag) same as 1 <sup>st</sup> column
Per written authorization of parent/guardian/legal custodian of juvenile, or juvenile 14 years and older to disclose to others. s. 48.396 (2)(am)	s. 938.396 (2)(am) same as 1 <sup>st</sup> column
Request of DHFS or federal agency to monitor and evaluate activities as required by law. s. 48.396(2)(b)	s. 938.396 (2)(b) same as 1 <sup>st</sup> column
Request of court handling actions affecting the family, attorney enforcing support obligations and parties in a paternity action. s. 48.396(2)(dm)	s. 938.396 (2)(g) same as 1 <sup>st</sup> column

## **APPENDIX 4**

### **HEALTH CARE PROVIDERS UNDER WISCONSIN LAW: CHAPTER 6**

"Health care provider" means any of the professionals and other entities listed under s. 146.81.

**(1)** "Health care provider" means any of the following:

- (a) A nurse licensed under ch. 441.
- (b) A chiropractor licensed under ch. 446.
- (c) A dentist licensed under ch. 447.
- (d) A physician, physician assistant, perfusionist, or respiratory care practitioner licensed or certified under subch. II of ch. 448.
- (dg) A physical therapist licensed under subch. III of ch. 448.
- (dr) A podiatrist licensed under subch. IV of ch. 448.
- (em) A dietitian certified under subch. V of ch. 448.
- (eq) An athletic trainer licensed under subch. VI of ch. 448.
- (es) An occupational therapist or occupational therapy assistant licensed under subch. VII of ch. 448.
- (f) An optometrist licensed under ch. 449.
- (fm) A pharmacist licensed under ch. 450.
- (g) An acupuncturist certified under ch. 451.
- (h) A psychologist licensed under ch. 455.
- (hg) A social worker, marriage and family therapist, or professional counselor certified or licensed under ch. 457.
- (hm) A speech-language pathologist or audiologist licensed under subch. II of ch. 459 or a speech and language pathologist licensed by the department of public instruction.
- (hp) A massage therapist or bodyworker certified under ch. 460.
- (i) A partnership of any providers specified under pars. (a) to (hp).
- (j) A corporation or limited liability company of any providers specified under pars. (a) to (hp) that provides health care services.
- (k) An operational cooperative sickness care plan organized under ss. 185.981 to 185.985 that directly provides services through salaried employees in its own facility.
- (L) A hospice licensed under subch. IV of ch. 50.
- (m) An inpatient health care facility, as defined in s. 50.135 (1).
- (n) A community-based residential facility, as defined in s.50.01 (1g).
- (p) A rural medical center, as defined in s. 50.50 (11).

## APPENDIX 5

**TABLE 5: CHAPTER 7 - AUTHORIZED DISCLOSURES OF PUPIL RECORDS**

<b>PUPIL RECORDS</b>	
<ul style="list-style-type: none"> <li>▪ To employees of school district with legitimate educational interests. s. 118.125(2)(d)</li> <li>▪ To a public officer any information required under Chapters 115-121. s. 118.125(2)(g)1.</li> <li>▪ To Department of Public Instruction (DPI) for audit/evaluation of federal or state program, or to assess compliance with chapters 115-121. s. 118.125(2)(g)2.</li> <li>▪ To comply with a court under Chapters 48 and 938 after attempt to notify parent/guardian. s. 118.125(2)(L)</li> <li>▪ To appropriate authorities when necessary to protect health/safety of any person (emergency). s.118.125(2)(p)</li> <li>▪ To Multidisciplinary Team under Chapter 115. s.118.125(5)(a)</li> <li>▪ To parent/guardian of adult pupil who is dependent on parent/guardian when pupil has not objected. s.118.125(2)(k)</li> <li>▪ For the purpose of providing services before adjudication under Chapter 48 or 938 to law enforcement agency, district/city attorney, corporation counsel, agency under s. 938.78(1), intake worker, court of record, municipal court, private school, or another school board pursuant to an interagency agreement. s.118.125(2)(n)</li> <li>▪ To a court upon issuance of a subpoena to review in camera for purpose of impeaching a witness. s.118.125(2)(f)</li> </ul>	
<b>PROGRESS RECORDS</b>	
<ul style="list-style-type: none"> <li>▪ Upon request of a judge conducting a legal proceeding involving a pupil. s.118.125(2)(c).</li> </ul>	
<b>BEHAVIORAL RECORDS</b>	
<ul style="list-style-type: none"> <li>▪ Disclosure permitted as part of pupil record when disclosure of pupil record is authorized.</li> </ul>	
<b>DIRECTORY DATA</b>	
<ul style="list-style-type: none"> <li>▪ To any person with prior proper notice to the parent/guardian of the type of data included and parent/guardian has not objected to disclosure without prior consent. s. 118.125(2)(j)1.</li> <li>▪ To technical college district (if parent/guardian has notice and has not objected) names of pupils expected to graduate from high school in current school year. s. 118.125(2)(j)2.</li> <li>▪ To law enforcement agency, DA, city attorney, corporation counsel, county department, court of record, municipal court for purpose of enforcing pupil's school attendance, investigating alleged criminal/delinquent activity, or relating to health and safety with prior notice to parent or guardian and that person has not objected). s. 118.125(2)(j)3.</li> <li>▪ Disclosure permitted as part of pupil record when disclosure of pupil record is authorized.</li> </ul>	



**Appendix 5: Table 5 Continued**

PUPIL PHYSICAL HEALTH RECORDS
<ul style="list-style-type: none"> <li>Health information not covered by s. 118.125(1)(cm) governed by ss. 146.81-84. s. 118.125.(2m)(a)</li> <li>HIV results governed by s. 252.15. s. 118.125.(2m)(b)</li> </ul>
LAW ENFORCEMENT UNIT RECORDS
<ul style="list-style-type: none"> <li>Disclosure as permitted by law enforcement agency standards under s. 938.396(1) to (1x) and (5). s. 118.125(7)</li> </ul>
LAW ENFORCEMENT AGENCY INFORMATION
<ul style="list-style-type: none"> <li>Limited to information under s. 938.396(1m): Investigation of possession of alcohol, controlled substance or dangerous weapon, or regarding pupil taken into custody for alleged violation of law.</li> <li>To designated school district employees with legitimate educational interests, including safety, and to those who provide treatment programs. s. 118.127(2)</li> </ul>
ATTENDANCE RECORDS
<ul style="list-style-type: none"> <li>To law enforcement with written certification that pupil is being investigated for truancy or a criminal/delinquent act and will not further disclose. s. 118.125(2)(cg)</li> <li>To a fire investigator who certifies that the pupil is under investigation and the attendance record is needed and will not further disclose. s. 118.125(2)(ch)</li> <li>Names of dropouts in response to a court order issued under s. 118.163(2m)(b). s. 118.125(2)(c)2.</li> <li>To county department supervising a child under a Chapter 48 or 938 dispositional order. s. 118.125(2)(cm)</li> <li>Disclosure permitted as part of pupil record when disclosure of pupil record or directory data is authorized. s. 118.125(1)(b) and (d)</li> </ul>
LEAD SCREENING RECORDS
<ul style="list-style-type: none"> <li>To local and state official under ss. 254.11 to 254.178. s. 118.125(2)(hm)</li> </ul>

**Appendix 5: Table 5 Continued**

<b>AODA INFORMATION</b> <b>(Confidential Communications—Information received from a pupil about self or other pupil regarding use of alcohol or drugs)</b>
<ul style="list-style-type: none"> <li>▪ To report abuse and neglect as required under s. 48.981.</li> <li>▪ Social worker, teacher, counselor, psychologist or administrator who engages in AODA program activities shall not disclose information unless a serious risk to health, safety or life of any person exists and disclosure will alleviate the danger. s. 118.126(1)(b)</li> <li>▪ Social worker, teacher, counselor, psychologist or administrator who engages in AODA program activities shall not disclose information unless required to report information under s. 48.981. s. 118.126(1)(c)</li> </ul>
<b>IMMUNIZATION RECORDS</b>
<ul style="list-style-type: none"> <li>▪ To DHFS for purposes under s. 252.04. s. 118.125(2)(hm)</li> </ul>
<b>NAMES OF WITHDRAWN PUPILS; NAMES OF DROP-OUTS</b>
<ul style="list-style-type: none"> <li>▪ To technical college district board, public assistance agency, DHFS, DWD or county department names of withdrawn pupils. s. 118.125(2)(i)</li> <li>▪ To a court the names of dropouts in response to court order under s. 118.163(2m)(b). s. 118.125(2)(c)2.</li> </ul>
<b>PERSONALLY IDENTIFIABLE INFORMATION TO PARENTS OF ADULT PUPIL</b>
<ul style="list-style-type: none"> <li>▪ To parent of adult pupil dependent on parent if adult pupil has not stated in writing that information may not be disclosed. s. 118.125(2)(k)</li> </ul>
<b>PUPIL HARM TO OTHERS</b>
<p>If a pupil has seriously physically harmed another person within the past 12 months or exhibits a pattern of seriously physically harming others AND there is reasonable cause to believe a current risk exists, school district may provide to teachers and other school personnel the minimum amount of information necessary to meet the educational needs of the students and protect the safety of staff and students. s. 118.128</p>

## **APPENDIX 6**

### **ELEMENTS OF A VALID AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION: CHAPTER 8**

#### **Basic Information Required**

11. Health care provider authorized to make the written, electronic or verbal disclosure.
12. Name of patient whose information is being disclosed.
13. Authorized recipient of the information.
14. Description of protected health information (PHI) to be disclosed; specificity required.
15. Purpose of disclosure
16. Notice of rights of subject of records.
  - a. Right to receive a copy of the authorization.
  - b. Right to revoke the authorization.
  - c. Statement of whether receipt of treatment, payment for services, or eligibility for coverage are based on signing.
  - d. Risk of further disclosure if recipient not covered by Wis./federal privacy laws.
  - e. Statement of provider's use of information for marketing/fundraising.
17. Effective time period of the authorization; expiration date or event.
18. Signature of patient or other person authorized to sign on behalf of the patient.
19. If signed by an authorized representative, state relationship.
20. Date signed.

#### **Additional Information for Certain Types of Health Information**

- If information relates to mental health, developmental disabilities or AODA, a statement must be included that patient has a right to inspect/copy disclosed information.
- If information being disclosed relates to HIV test results, statement must be included regarding entities to whom health provider can disclose without authorization.  
s. 252.15(5)(a)

## APPENDIX 7

**TABLE 6: CHAPTER 9 - INDIVIDUALS WITH RIGHT TO ACCESS AND AUTHORIZE  
DISCLOSURE OF HEALTH INFORMATION**

<b>ADULT</b>				
<b>S. 146.82</b>	<b>S. 51.30</b>	<b>S. 252.15</b>	<b>42 C.F.R. Part 2</b>	<b>45 CFR Part 164</b>
Adult has right to access and authorize disclosure of own information.	Same as s 146.82.	Same as s 146.82.	Same as s 146.82.	Same as s 146.82.
<b>HEALTH CARE AGENT AND GUARDIAN OF THE PERSON</b>				
Health care agent under a valid activated Power of Attorney for Health Care or guardian of the person appointed by a court has authority to access and authorize disclosure of principal's or ward's information.	Same as s. 146.82  NOTE: Neither guardian nor agent may place an individual in a mental health treatment facility. Ward or principal must provide informed consent or a court order under ch. 51 must be obtained.	Same as s. 146.82	Same as s. 146.82	Same as s. 146.82  NOTE: Regulations would permit others to act on behalf of adult subject not permitted under Wisconsin law.
<b>PARENT/GUARDIAN OF A MINOR</b>				
Parent/guardian of a minor under 18 years of age.	Parent/guardian of a minor under 18 years of age.  See box below regarding minor aged 14 years and older.	Parent/guardian for a minor under 14 years of age.	Parent/guardian for a minor under 12 years of age	Parent/guardian for a non-emancipated minor.

**Appendix 7: Table 6 Continued**

MINOR				
Minors lack authority.	Minor aged 14 years and older.  NOTE: Consent of parent or guardian not also required.	Minor 14 years of age or older controls access to and disclosure of information. Minor may deny access to parent or guardian.	Minor 12 years of age or older controls access to and disclosure of information. Minor may deny access to parent or guardian	Silent regarding authority of a minor. Follow Wisconsin laws that provide subject greater access.
AUTHORIZED REPRESENTATIVES OF A DECEASED PERSON				
<ul style="list-style-type: none"> <li>• Parent/guardian of a deceased minor.</li> <li>• Spouse or Personal Representative of a deceased adult. (A personal representative is an individual appointed by a court).</li> <li>• If no spouse survives a deceased adult, the following next of kin have <b>equal</b> authority to act on behalf of the deceased individual: adult children, parents, grandparents, and adult siblings and their spouses.</li> </ul>				

## APPENDIX 8

TABLE 7: CHAPTER 10 - RECORDING DISCLOSURES OF HEALTH INFORMATION	
DISCLOSURES REQUIRING RECORDING	
CHAPTERS 51 AND 146	HIPAA
<p>s. 146.82(2)(d) and s. 51.30 (4)(e): require a notation in the patient record of disclosures/releases made <b>with or without authorization of patient</b>.</p> <p><b>NOTE:</b> Wisconsin law controls because it provides more privacy protection to the patient than HIPAA.</p> <p>Notation requirement applies to health information maintained in any record including a school record.</p>	<p>Requires recording of the following disclosures made <b>without patient authorization</b> in a log:</p> <ul style="list-style-type: none"> <li>• Public health activities</li> <li>• Mandatory reporting of abuse, neglect, or violence against any person</li> <li>• Health oversight activities</li> <li>• Judicial/administrative proceedings</li> <li>• Law enforcement activities except relating to inmates</li> <li>• About decedents as required by law</li> <li>• Research purposes</li> <li>• Specialized government functions</li> <li>• Workers' Compensation</li> </ul>
DISCLOSURES NOT REQUIRING RECORDING	
CHAPTERS 51 and 146	HIPAA
<p>No exceptions identified.</p> <p><b>NOTE:</b> Wisconsin law controls because it provides more privacy protection to the patient than HIPAA.</p>	<p>Disclosures that do <b>NOT</b> require logging:</p> <ul style="list-style-type: none"> <li>• For treatment, payment, and healthcare operations</li> <li>• Disclosures made prior to a health care provider becoming a covered entity</li> <li>• To subject of information</li> <li>• To recipient named in signed authorization</li> <li>• For national security and intelligence purposes</li> <li>• To persons involved in care of patient</li> <li>• For notification purposes to family</li> <li>• To law enforcement and correctional institutions per state law</li> <li>• Facility directories (hospitals)</li> </ul>

**Appendix 8: Table 7Continued**

<b>CONTENTS OF NOTATION/LOG</b>	
<b>CHAPTERS 51 and 146</b>	<b>HIPAA</b>
<p>Information to be recorded in patient record:</p> <ul style="list-style-type: none"> <li>• Name of recipient</li> <li>• Date and time of disclosure</li> <li>• Type of information disclosed</li> </ul> <p><b>NOTE:</b> Requirements of Wisconsin laws and HIPAA must be met.</p>	<p>Information for HIPAA log:</p> <ul style="list-style-type: none"> <li>• Name and address of recipient (if known)</li> <li>• Date of disclosure</li> <li>• Brief description of PHI</li> <li>• Purpose of disclosure or copy of authorization/request</li> <li>• Summary entry permitted for multiple disclosures to same party for the same purpose</li> </ul>
<b>ACCESS TO RECORDING/LOG</b>	
<p>Recording of disclosures is contained in the record itself so is accessible when the record is accessed.</p>	<p>Subject of record may request access to the log that must be retained for 6 years.</p>

## **APPENDIX 9**

**TABLE 8: CHAPTER 10 - RECORDING OF DISCLOSURES OF EDUCATION INFORMATION**

<b>REQUESTS/DISCLOSURES REQUIRING RECORDING</b>
All requests/disclosures <b>except</b> as described in the following section.
<b>DISCLOSURES NOT REQUIRING RECORDING</b>
<ul style="list-style-type: none"><li>• To parents of dependent students under 34 C.F.R. 99.31 (a)(8).</li><li>• Pursuant to court orders, lawfully issued subpoenas or litigation under s. 99.31(a)(9).</li><li>• Disclosures of directory information under s. 99.31(a)(11).</li><li>• Disclosures to parents/student under s. 99.31 (a)(12).</li><li>• Disclosures with respect to disciplinary proceedings under s. 99.31 (a)(14).</li><li>• To parents under s. 99.31 (a)(15).</li></ul> <i>34 C.F.R. s. 99.33(c)</i>
<b>OBLIGATION TO INFORM RECIPIENT OF PROHIBITION OF RE-DISCLOSURE UNDER 34 C.F.R. S. 99.33</b>
All recipients except for disclosures under s. 99.31(a) (9), (11) and (12.) [see above]
<b>CONTENTS OF RECORD OF DISCLOSURES</b>
<ul style="list-style-type: none"><li>• Party making the request or recipient of information.</li><li>• Legitimate interests of requesting/receiving party.</li><li>• Date access provided.</li><li>• If information will be further disclosed by recipient under s 99.33 (b), names of additional recipients and their legitimate interests.</li></ul>



## APPENDIX 10

**TABLE 9: CHAPTER 11 - PENALTIES FOR VIOLATING PRIVACY LAWS GOVERNING HEALTH INFORMATION**

<b>PATIENT HEALTH CARE RECORDS UNDER S. 146.84</b>	
<b>Civil Penalties. s. 146.84 (1)</b>	
<p>Actions for violations; damages; injunction:</p> <ul style="list-style-type: none"> <li>▪ Custodian of records incurs no liability for release when acting in good faith.</li> <li>▪ Violator who acted in a knowing and willful manner liable for actual damages to person and up to \$25,000 in exemplary damages for each violation, plus cost and attorney fees.</li> <li>▪ Violator who negligently violates confidentiality liable for actual damages to a person and up to \$1,000 in exemplary damages for each violation, and costs and attorney fees</li> <li>▪ A person may bring an action to enjoin any violation or to compel compliance as well as seek damages as stated above.</li> </ul>	
<b>Criminal Penalties. s. 146.94 (2)</b>	
<ul style="list-style-type: none"> <li>▪ Whoever does any of the following may be fined not more than \$25,000 or imprisoned for not more than 9 months or both: <ul style="list-style-type: none"> <li>✓ Requests/obtains confidential information under false pretenses</li> <li>✓ Discloses confidential information with knowledge that the disclosure is unlawful and is not reasonably necessary to protect another from harm.</li> <li>✓ Violates s. 146.83(4)</li> </ul> </li> <li>▪ Whoever negligently discloses confidential information is subject to a forfeiture of not more than \$1,000 per violation.</li> <li>▪ Whoever intentionally discloses confidentially informant under this chapter, knowing that the information is confidential, and discloses the information for pecuniary gain may be fined not more than \$100,000 or imprisoned not more than 3 years and 6 months, or both.</li> </ul>	
<b>MENTAL HEALTH, DEVELOPMENTAL DISABILITIES, AND AODA INFORMATION</b>	
<b>Civil Penalties. s. 51.30 (9)</b>	
<p>Actions for violations; damages; injunction</p> <ul style="list-style-type: none"> <li>▪ Violator liable for actual damages to a person and up to \$1,000 in exemplary damages for each violation, and costs and attorney fees.</li> <li>▪ No liability to custodian of records when acting in good faith.</li> <li>▪ Violator who acted in a knowing and willful manner liable for actual damages to person and up to \$25,000 in exemplary damages for each violation, plus costs and attorney fees. Actual damages to plaintiff are not a pre-requisite.</li> <li>▪ A person may bring an action to enjoin any violation or to compel compliance as well as seek damages as stated above.</li> </ul>	

**Appendix 10: Table 9 Continued**

<b>Criminal Penalties.</b> s. 51.30 (10)
<ul style="list-style-type: none"> <li>▪ Whoever does any of the following may be fined not more than \$25,000 or imprisoned for not more than 9 months or both: <ul style="list-style-type: none"> <li>✓ Requests/obtains confidential information under false pretenses</li> <li>✓ Discloses confidential information with knowledge that the disclosure is unlawful and is not reasonably necessary to protect another from harm.</li> <li>✓ Violates s. 51.30(4)(dm)1, 2. or 3., or s. 146.83(4)</li> </ul> </li> <li>▪ Whoever negligently discloses confidential information is subject to a forfeiture of not more than \$1,000 per violation.</li> <li>▪ Whoever intentionally discloses confidential information under this Chapter, knowing that the information is confidential, and discloses the information for pecuniary gain may be fined not more than \$100,000 or imprisoned not more than 3 years and 6 months, or both.</li> </ul>
<b>Employee Discipline.</b> s. 51.30 (11)
Any employee of DHFS, county department or public treatment facility who violates this Chapter or any rule promulgated pursuant to this Chapter may be subject to discharge or suspension without pay.
<b>HIV TEST RESULTS</b>
<b>Civil Liability.</b> s. 252.15(8)
Any person who violates statute is liable to subject of the test for actual damages, costs, attorney fees, and exemplary damages up to \$1,000 for a negligent violation and up to \$25,000 for an intentional violation.
<b>ALCOHOL AND DRUG ABUSE PATIENT RECORDS</b>
<b>Criminal penalty for violation.</b> s. 2.4
Any person who violates any provision shall be fined not more than \$500 for a first offense and not more than \$5,000 for each subsequent offense.
<b>HIPAA</b>
<b>Civil Penalties.</b> s. 1176, Public Law 104-191
\$100 per violation per person up to a maximum of \$25,000 per person per year per standard violated

**Appendix 10: Table 9 Continued - HIPAA**

**Criminal Penalties.** s. 1177, Public Law 104-191

- A person who knowingly and in violation of the law does one of the following:
  - ✓ Uses/causes to be used a unique health identifier
  - ✓ Obtains individually identifiable health information relating to an individual
  - ✓ Discloses individually identifiable health information to another person
- Shall:
  - ✓ Be fined not more than \$50,000, sentenced to 1 year in prison, or both;
  - ✓ If the offense is committed under false pretenses, be fined not more than \$100,000, sentenced to no more than 5 years in prison, or both; and
  - ✓ If the offense is committed to use the individually identifiable health information for commercial advantage, personal gain or malicious harm, be fined not more than \$250,000, sentenced to not more than 10 years in prison, or both.